91-1270

Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, *et al.*,
Appellants,

vs.

LOUIS TERRAZAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT FOR APPELLANTS

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QUESTIONS PRESENTED

1. May a local three-judge federal district court acting under section 5 of the Voting Rights Act substitute a court-crafted redistricting plan for a legislatively approved plan that obtained section 5 preclearance from the United States Department of Justice?

2. Does preclearance from the United States Department of Justice establish prima facie validity of a redistricting plan so as to preclude interim injunctive relief under section 2 of the Voting Rights Act absent extreme and unique circumstances?

LIST OF PARTIES

Plaintiffs

Louis Terrazas
Ernest Angelo, Jr.
Tom Craddick

Plaintiff-Intervenors

Sim D. Stokes III
Robert A. Estrada
David Sibley
Bill Sims
Eddie Lucio, Jr.

Defendants

Ann Richards, Governor of Texas
Dan Morales, Attorney General of Texas
John Hannah, Jr., Secretary of State of Texas
Bob Slagle
Fred Meyer

Intervenors for limited purposes

Sharon Gabert
Jo Ann Reyes
Royla Cox
Bruce Auld
Fred W. Davis
Jeff Walker
R. E. Thornton
Bob Aikin
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TEXAS'S JURISDICTIONAL STATEMENT

The Governor, Attorney General, and Secretary of State of Texas (Ann Richards, Dan Morales, and John Hannah, collectively termed "the state"), appellants herein, appeal from a preliminary injunction entered by a divided three-judge panel of the United States District Court for the Western District of Texas. The preliminary injunction compels the state to conduct its 1992 primary elections for the Texas Senate under a court-ordered interim redistricting plan instead of a precleared legislative redistricting plan. The challenged preliminary injunction is embodied primarily in the district court order of January 10, 1992, as amended on January 13, 16, and 24, 1992, and to a lesser extent, in the district court order of December 24, 1991. This jurisdictional statement is submitted to show that the Court has jurisdiction of the appeal, that substantial questions are presented, and that summary reversal is warranted.

OPINIONS BELOW

The opinions below are: Order and Judgment of January 10, 1992; Amended Order and Judgment of January 13, 1992, January 16, 1992, and January 24, 1992; and Summary Opinion and Judgment of December 24, 1991. None is reported. They are reproduced in the appendix accompanying this statement ("J.S. App.") beginning at 1a, 18a, 21a, 23a, and 25a, respectively.[1]

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[1] This appeal focuses on the order of January 10, 1992, and to a somewhat lesser extent, on the part of the order of December 24, 1991, applicable to the Texas Senate. The order of January 13, 1992, makes technical corrections to some relevant demographic data, and the orders of January 16 and 24, 1992, address election administration matters not pertinent to the issues raised here.

In evaluating the district court's orders, the Court should be aware that the same principal set of plaintiffs also challenged redistricting plans for the Texas House of Representatives and Texas Congressional seats, neither of which is before the Court.

JURISDICTION

The three-judge district court was convened pursuant to 28 U.S.C. § 2284(a), and entered its preliminary injunction under the aegis of section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, because the action challenged the apportionment of the Senate of Texas, a statewide legislative body. The preliminary injunction orders which the state appeals were entered on January 10, 1992, as amended on January 13, 16, and 24, 1992, as well as on December 24, 1991.

The state filed a Notice of Appeal and an Amended Notice of Appeal on January 13, 1992, and a Second Amended Notice of Appeal on February 3, 1992. They are reproduced at J.S. App. 52a, 54a, and 56a, respectively, (omitting the certificates of service).

The jurisdiction of the Court to hear this appeal rests on 28 U.S.C. § 1253 and 42 U.S.C. § 1973c. It has been timely invoked.

STATUTES INVOLVED

The principal federal statutes involved are sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973c. They are reproduced at J.S. App. 58a & 59a.

The principal state statute involved is Senate Bill 1 ("S.B. 1" or "legislative Senate plan"), enacted and signed

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The three challenges -- to the Senate, the House, and Congress -- were assigned separate docket numbers (with the Senate challenge assigned "-426"). The district court's orders sometimes addressed more than one of the challenges, with the consequence that more than one of the docket numbers often appears in the heading of an order.

on January 8, 1992, in the third called session of the 72nd Texas Legislature. It is the legislative redistricting plan for the Texas Senate and is too voluminous to warrant reproduction, even in the joint appendix, inasmuch as its precise details are not involved at this stage of the appeal.[2]

STATEMENT OF THE CASE

The Texas Senate is comprised of thirty-one members elected from thirty-one separate districts. Together, the senators function as one arm of the bicameral Texas Legislature, collectively representing approximately 17 million Texans. All thirty-one seats are to be filled by election in 1992.

The challenge to the state's Senate redistricting plan was filed in late May, 1991, before it had even been enacted. What was then known as Senate Bill 31 ("S.B. 31" or "abandoned Senate plan") did not become law until mid-June; nonetheless, the district court treated the challenge as one to the enacted law, S.B. 31. In August, the state submitted S.B. 31 to the Department of Justice ("DOJ") for administrative preclearance under section 5 of the Voting Rights Act.

In early October, the state settled a state law challenge to S.B. 31 in state court. The state withdrew its section 5 DOJ submission of S.B. 31, promptly substituting a submission of the Senate plan approved in the state court settlement. The new Senate plan became known as the *Quiroz/Mena* plan, after the styles of the state cases in which the settlements were approved. (The later-enacted S.B. 1 plan *is* the *Quiroz/Mena* plan.)

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2 S.B. 1's district boundaries were admitted into evidence at the preliminary injunction hearing as an appendix to Defendants' Exhibit 22.

DOJ precleared the Senate plan on November 18, 1991. *See* Letter from Mr. Dunne to Texas Secretary of State Hannah, J.S. App. 62a.[3] On December 3, 1991, the state began implementation of its precleared Senate plan through the opening of the candidate qualifying period under state law. *See* TEX. ELECTION CODE § 172.023(b).

In the meantime, before the Senate plan had been precleared, the federal district court on its own had established a deadline of November 12, 1991, for parties to submit briefs on the interim relief they would be seeking if section 5 preclearance had not been obtained in time for the 1992 elections to occur on schedule. Later, after the November 12th deadline, the district court gave the challengers until November 27th to file for an interim Senate redistricting plan, still conditioning such relief, however, on the failure of timely section 5 preclearance. Notwithstanding DOJ's preclearance over a week earlier of the state's Senate plan, and the conditional nature of the district court's invitation, the challengers filed for a court-ordered interim Senate plan.

The preliminary injunction hearing on whether the district court would order interim Senate, House, and Congressional plans began the afternoon of December 10th and ended on December 13th. The Senate plan sponsored by the state at the hearing was the *Quiroz/Mena* (that is, S.B. 1) plan, not S.B. 31 (the now-abandoned plan targeted in the challengers' pleading). The state argued to the district court that, since a state-sponsored plan was available and had been precleared by DOJ, that state plan should be implemented if any injunctive relief were to issue.

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[3] DOJ's reserved deadline of January 14, 1992, for possible reexamination of its November 18th preclearance decision passed without DOJ action.

Shortly after the preliminary injunction hearing, the Supreme Court of Texas returned the *Quiroz/Mena* settlement to the state district court. It did not invalidate the settlement on any substantive ground, but did impose (in a decision with no majority opinion) new procedural requirements for state district courts' approval of redistricting settlements. *See Terrazas v. Ramirez*, __ S.W.2d __, No. D-1817, 1991 WL 269035 (Tex. Dec. 17, 1991).[4] This decision rested purely on independent state procedural grounds and did not affect the federal issues before the three-judge federal district court.

Immediately after the Texas Supreme Court's action, the Governor called the Texas Legislature to convene in special session on January 2, 1992. Legislative redistricting was the only issue permitted on the agenda.

Notwithstanding the Governor's call, on December 24, 1991, eleven days after conclusion of the preliminary injunction hearing, the district court, by a 2-1 vote, ordered the state to implement a court-ordered, interim Senate plan for the 1992 primary elections scheduled for March 10, 1992. The district court rejected the state's arguments in favor of the *Quiroz/Mena* plan as an interim apportionment measure and, instead, crafted its own redistricting plan. In so acting, the district court relied exclusively upon the Voting Rights Act, explicitly eschewing any other basis for its decision.

The district court acknowledged the Senate plan sponsored by the state to be the only one before it that

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[4] The state district court complied with the *Terrazas v. Ramirez* procedural directive and entered final judgment on January 13, 1992, requiring the state to implement S.B. 1 as its Senate redistricting plan.

had received section 5 preclearance but nonetheless ignored it. Instead, the court characterized the state's plan as "merely an alternative proposal submitted to the Court that because of the actions of the Secretary of State happened to receive favorable review by the DOJ[.]" J.S. App. 39a.

Judge Garwood, the panel member from the Fifth Circuit, dissented from the two-member majority's failure to show deference to state legislative choices. It was his view that the court should give the legislature an opportunity to act in the special session that was to commence in only a week. *See* J.S. App. 51a.

The state moved the district court to modify or stay its December 24th judgment to give the legislature a chance to act. The district court did not rule immediately on the motion.

While the state's motion pended before the district court, the legislative session commenced, and on January 8, 1992, the Texas Legislature enacted the precleared *Quiroz/Mena* Senate plan as S.B. 1. In a companion enactment of the same date, known as House Bill 2 ("H.B. 2"), the legislature established March 10, 1992, as the preferred party primary date, but more importantly, established its legislative preference to have the party primaries moved to April 11, 1992, if that was the only way that the federal court would permit the Senate primaries to be conducted using the precleared S.B. 1. In other words, H.B. 2 gave legislative primacy to implementation of S.B. 1 instead of to the March 10th primary election.

The next day, the state filed an emergency motion for the district court to substitute the S.B. 1 plan for the court-ordered interim Senate plan. The next day after that, on January 10th, the district court, again by a 2-1

vote, denied the motion without a hearing. Instead of ordering the March 10th primary elections to go forward under the precleared, legislatively-enacted Senate plan, the court ordered the primaries to go forward under a court-ordered Senate plan.[5] Not only did the court-ordered plan reject the state districting arrangements, but it also contained an unexplained maximum population deviation of 9.98%. Judge Garwood again dissented because the court had failed to show deference to the state's legislative choice for a Senate plan. J.S. App. 16a

The state immediately sought an emergency stay from this Court of the district court's order concerning the Senate. The Court denied the stay on January 16, 1992, in *Richards v. Terrazas*, No. A-498.

THE QUESTIONS ARE SUBSTANTIAL

The district court acted beyond its jurisdiction under section 5 of the Voting Rights Act, and abused its very limited discretion under section 2 of the Act, by substituting a court-ordered interim plan for a legislatively-approved plan that had been precleared under section 5. In this circumstance, expedited summary reversal is necessary to avoid an unprecedented encroachment on state sovereignty and to permit the state to conduct its upcoming 1992 primaries (rescheduled if necessary) under a precleared plan reflecting its own legislative choices rather than the unprecleared (and evidentiarily unexamined) choices of a two-member majority of the district court.

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[5] The January 10th order by its terms reaches only the 1992 primary elections. The court has said nothing about the 1992 general elections -- or about why it has said nothing about them.

I.

A LOCAL THREE-JUDGE FEDERAL COURT, FUNCTIONING AS A SECTION 5 COURT, HAS NO JURISDICTION TO SUBSTITUTE A COURT-ORDERED REDISTRICTING PLAN FOR A LEGISLATIVELY-APPROVED PLAN THAT HAS OBTAINED ADMINISTRATIVE PRECLEARANCE UNDER SECTION 5

In shunting aside the legislatively-adopted, precleared plan embodied in S.B. 1, and substituting its own court-devised interim plan, the district court functioned as a local federal court convened under section 5 of the Voting Rights Act. Its scheduling orders conceived the preliminary injunction hearing as one tied to a section 5 failure, and when the time came, it addressed the Senate redistricting issue as though it were faced with a vacuum which it was obligated to fill. The vacuum did not in fact exist, but the court's approach, and the language it employs, demonstrate its reliance on the principles of section 5. It had no jurisdiction to supplant state choices as it did.

Issued barely more than a day after S.B. 1's enactment and without benefit of any evidentiary hearing, the district court's meandering January 10th opinion assails the state's policy choices on a number of grounds. The grounds, such as the extensive comments on the cost to Texas taxpayers of delaying elections (as the legislature contingently chose to do) and the possible impact of voter registration certificates on voter turnout, *see* J.S. App. 8a, 11a, largely present no federal question. Insofar as the decision rests on state law grounds, it is legally ineffective and must be reversed. *City of Lockhart v. United States*, 460 U.S. 129, 132-33 & n.8 (1983).

The federal law ground identified by the district court for its preliminary injunction of January 10, 1992,

is section 5 of the Voting Rights Act. Indeed, the decision, as were the scheduling orders culminating in it, is conceptualized exclusively in section 5 terms. The district court states in its January 10th order:

> As for the federal questions presented at this time, this Court further finds any attempt to adopt the legislatively-draw [sic] Senate plan would delay the elections since preclearance of that plan has not been obtained and there has been no indication that it will be obtained in time for the election to proceed.

J.S. App. 12a.

The district court misperceives its authority in this case. The jurisdiction of a local three-judge court under section 5 is limited to the determination of whether a proposed change in election practices is subject to the preclearance requirements of the Act and, if it is, whether it has been precleared. *City of Lockhart, supra*, 460 U.S. at 129 n.3; *Allen v. State Board of Elections*, 393 U.S. 544, 557-60 (1969).

The local court is expressly denied authority to render declaratory or other judgments concerning the legality of a proposed change in election practices under section 5. That power, at least in the judicial realm, is reserved exclusively to the District Court for the District of Columbia. 42 U.S. C. § 1973*l*(b); *Hathorn v. Lovorn*, 457 U.S. 255, 267 (1982).

Any injunctive power the local three-judge court may have exercised in this case had to have been predicated on a finding that the state was seeking to implement an electoral change as to which it had not received preclearance. Only in such circumstances may the local district court exercise its equitable powers to fashion an

interim plan pending preclearance of a state-created redistricting plan. *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971); *see also Clark v. Roemer*, 111 S.Ct. 2096, 2105 (1991). Two distinct reasons reveal why the district court ventured too far in substituting its own interim plan for the state's S.B. 1.

First, the local three-judge district court lacked jurisdiction to enter a section 5 order on January 10, 1992. The court made no finding that the state was not in compliance with section 5, nor could it have. As of January 8, 1992 -- only two days earlier -- the state had properly approved under its laws a Senate redistricting plan that already had been precleared. The state already had sought and obtained section 5 preclearance of the *Quiroz/Mena* plan, which is S.B. 1 in court garb. A state plan crafted by a state court under state law is undoubtedly a state enactment subject to section 5. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). Administrative preclearance by DOJ is a final, judicially non-reviewable act under section 5. *Morris v. Gressette*, 432 U.S. 491 (1977). Thus, as of November 18, 1991, there was no federal issue under section 5 of the Act concerning the legality and enforceability of the *Quiroz/Mena* plan. The state had faithfully and fully complied with federal voting rights requirements.

The only intervening event was a decision of the state Supreme Court premised exclusively on state procedural grounds. That court's decision in *Terrazas v. Ramirez*, while containing no rule of decision supported by a court majority, at best set aside the *Quiroz/Mena* settlement on the grounds stated in a three-member plurality opinion. It required a fuller opportunity for affected parties' intervention, for a trial court hearing on the proposed settlement, and (striking a familiar chord) for the trial court to give the legislature an opportunity to act correctively (which it indeed did). The grounds and

reasoning of the Texas Supreme Court were premised exclusively on state law questions that did not affect the legality of the underlying redistricting plan under section 5.

In the wake of the state Supreme Court decision, the state promptly adjusted the procedural basis for the plan embodied in the *Quiroz/Mena* settlement. It simply legislatively enacted the identical plan as S.B. 1. This adjustment created no federal law issue under section 5. Substituting one form of state law implementation (legislative approval and gubernatorial signature) for another (state court judgment) which had been invalidated on state procedural grounds does not implicate section 5 concerns. As this Court has written, "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect." *City of Lockhart, supra*, 460 U.S. at 133.

This substitution of one form of enactment of a state plan for another is beyond section 5's purview. It does not affect the procedures for casting ballots, the requirements for candidates for office, the districting system itself, or the types of offices to which candidates may be elected. As this Court held only last week, these are the types of electoral changes to which section 5 applies. *Presley v. Etowah County*, __ U.S. __ (Jan. 27, 1992) (Nos. 90-711 & -712). The substitution of one form of state ratification for another *of the identical plan* is not a "change" requiring preclearance under section 5.

Moreover, retrogression, as established in *Beer v. United States*, 425 U.S. 130 (1976), cannot be present here. After receiving administrative preclearance, but before the state Supreme Court's state law procedural invalidation, the state had begun implementing the plan embodied in the *Quiroz/Mena* settlement and S.B. 1.

Candidate qualifying pursuant to the plan had begun for the March 10th general primary election.[6] The *Quiroz/Mena* plan thus became the benchmark against which any subsequent changes, legislative or state court-ordered, would have to be measured under section 5 standards.[7] Because the S.B. 1 plan precisely mirrors the *Quiroz/Mena* plan, it is neither a change nor is it possibly retrogressive.

The foregoing matters firmly establish that on January 8, 1992, the state had a legislatively enacted plan, duly executed by the Governor, which already had been precleared by DOJ. This circumstance left the district court with no jurisdiction to enter its injunctive order of January 10, 1992. Indeed, to hold otherwise would repudiate the principle of non-reviewability of administrative preclearances announced in *Morris v. Gressette, supra.* The section 5 remedy is an "unusual" and "severe" procedure. *Allen*, 393 U.S. at 556. The rationale of *Morris* rests on the proposition that the extraordinary remedy of thwarting implementation of state legislation, redistricting plans included, "was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission." 432 U.S. at 504. Accordingly, the district court's severe intrusion into the state's domain is

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[6] The opening of a candidate qualifying period has been treated by both DOJ and reviewing courts as the implementation of an election system for purposes of section 5. *See South Carolina v. United States*, 585 F.Supp. 418, 421-22 (D.D.C. 1984 (3-judge court); *South Carolina v. United States*, 589 F.Supp. 757, 758 (D.D.C. 1984). *See also* letter of John R. Dunne to Texas Secretary of State Hannah, Nov. 12, 1991, J.S. App. 69a (warning Texas that it would violate section 5 if it opened candidate qualifying for its House of Representatives under an unprecleared plan because that would constitute implementation).

[7] The unprecleared court-ordered interim plan on appeal here does not serve as a benchmark. 28 C.F.R. § 51.54(b)(3).

fundamental legal error which warrants summary reversal.

Even were the Court to reject the state's claim that its Senate redistricting plan fully complies with section 5, there remains a second reason why the district court's imposition of its own plan is a venture beyond federalism's limits. Local three-judge courts have no authority to simply substitute their own reapportionment preferences for those of a state legislature. *Upham v Seamon*, 456 U.S. 37, 40-41 (1982); *White v. Weiser*, 412 U.S. 793, 795 (1973). As this Court revealingly characterized it, "primary jurisdiction" over legislative reapportionment rests with state legislatures. *Id.*

The district court inverted this maxim based on nothing more than the apparent view that, preclearance or not, it simply preferred its redistricting scheme over the legislatively chosen (and administratively precleared) one. This policy-based step tramples all limits which this Court has placed to insure the primary jurisdiction of the state legislature in matters of legislative apportionment. It ignores the plain direction of the Court in *Upham v. Seamon* that, in the absence of any objection by the Attorney General (and here we have none), "a court must defer to the legislative judgments the [redistricting] plans reflect, even under circumstances in which a court is required to effect an interim . . . plan." 456 U.S. at 40-41.

If the primary jurisdiction principle embodied in cases such as *Upham v. Seamon* has any content, then it invalidates the district court's usurpation of state legislative authority under any circumstances. The clear import of *Upham* is that determinations of policy are vested exclusively with the states and not federal courts. This lesson is all the more dramatically implicated here, where the state's enacted plan has obtained section 5 preclearance. In calling the legislature into special

session and in enacting a plan precisely mirroring a plan precleared less than two months earlier, both the Governor of Texas and the Texas Legislature undoubtedly relied on there being precisely the kind of predictability which this Court posited only last week in the penultimate paragraph of *Etowah County* as federalism's compulsion in the arena of state elections and governance.

The state put in place as its own a redistricting plan which had just received DOJ's crucial imprimatur. Barely over a day later, on January 10th, and without so much as a hearing, the district court changed the rules. It rejected the idea of predictability, substituting for it a near-whimsical interpretation of voting rights and federalism strictures. Section 5 and the doctrine of *Upham v. Seamon* are more confining than that; they require reversal of the district court's preliminary injunction.

II.

ADMINISTRATIVE PRECLEARANCE PURSUANT TO SECTION 5 ESTABLISHES THE PRIMA FACIE VALIDITY OF A REDISTRICTING PLAN, THEREBY PRECLUDING INTERIM INJUNCTIVE RELIEF UNDER SECTION 2 OF THE ACT ABSENT EXTREME AND UNIQUE CIRCUMSTANCES

The process leading to the January 10th order and its structure and language all point to it as a decision premised on section 5's doctrines. What the district court did is determinative; the labels affixed are irrelevant. Notwithstanding its section 5 foundation, the district court's opinion makes reference to section 2 of the Act. Even under section 2, the district court's unprecedented injunctive relief still veered from the course of legislative deference clearly marked by this Court's prior decisions.

Redistricting is a legislative task "which the federal courts should make every effort not to pre-empt." *McDaniel v. Sanchez*, 452 U.S. at 150 n.30. For jurisdictions such as Texas which are covered under section 5, there already exists a major intrusion into the traditional state domain of choosing how and when its elected officials are to be chosen. Before it can take even the first step of implementation of a covered change, the state must obtain approval from a federal judicial or administrative forum in the District of Columbia. Successfully clearing that preclearance hurdle may not entitle the state afterwards to proceed unimpeded, but the Court's repeated emphasis on the limited equitable powers of federal courts in reapportionment cases, *see, e.g., Upham v. Seamon, supra, and Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971), surely dictates that clearing the section 5 hurdle must, at least in the short run, greatly strengthen the presumption of validity which district courts are duty bound to give to state legislative enactments in the redistricting arena. As the Court has repeatedly noted, the preclearance mechanism reflects congressional choice in favor of specialized revision by DOJ and the District Court for the District of Columbia. *McDaniel*, 452 U.S. at 150-51. At the very least then, approval of the proposed redistricting plan under section 5 must create a strong prima facie inference of legitimacy for the state redistricting plan.

Here, the state's Senate redistricting plan cleared the section 5 hurdle only to be rejected by the district court. As previously set forth, the district court lacked any authority for this action. Similarly, the district court's weak global reference to section 2 cannot serve as a possible justification for its extraordinary injunctive order. In issuing its court-ordered plan as a preliminary injunction, the district court impermissibly disregarded the clear import and direction of the precedents from

this Court which establish the principle that section 5 preclearance vests a plan with prima facie validity, which can be overcome through a preliminary injunction only in extreme and unique circumstances not present in this case.[8]

In fact, the circumstances of this case are precisely the kind which warrant the most stringent application of the concept of prima facie validity to a precleared redistricting plan. Standing is questionable at best at this stage. This case is not a class action, and it has no organizational plaintiffs. The district court made no finding concerning the right of the named plaintiffs to bring a claim for relief under the Voting Rights Act.

It does not follow from the fact that the challengers may have had standing to pursue their partisan gerrymandering claim under *Davis v. Bandemer*, 478 U. S. 109 (1986), that they therefore had standing to seek relief under the Voting Rights Act as well. Of the alleged individual plaintiffs and plaintiff-intervenors, only three testified at the preliminary injunction hearing. All of them are Anglos, one a state representative and two, state senators. Additionally, this failure of testimony by any minority plaintiff challengers means that the challengers failed to satisfy the indispensable prerequisites to preliminary injunctive relief, including irreparable harm and the likelihood of success on the merits.

Most critically, the challengers cannot have satisfied the "likelihood of success on the merits" element for preliminary injunctions. There are no factual findings

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[8] This principle is further buttressed by the fact that DOJ, in exercising its section 5 administrative preclearance functions, looks to whether a change would present a "clear violation of amended section 2." 28 C.F.R. § 51.55(b)(2). The state's Senate plan cleared that hurdle, too.

about how or whether S.B. 1 violates section 2 in any fashion. There is a single sentence making a global statement about S.B. 1's section 2 insufficiency, with absolutely no supporting or subsidiary findings. J.S. App. 12a-13a. That, however, falls woefully short of the required specificity. Section 2 liability determinations must be district-specific. *Thornburg v. Gingles*, 478 U.S. 30, 59 n.28 (1986); *cf. Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1203-04 (5th Cir. 1989) (requiring detailed findings in section 2 cases). As this Court stressed in *Upham*, a section 5 case, even the finding of impermissibility in one district, does not give a local district court license to treat all legislative redistricting as a *tabula rasa*. 456 U.S. at 43. *See also White v. Weiser*, 412 U.S. at 794-95 (under one-person, one-vote challenge, courts should honor state policies as much as possible).

The question of how the public interest element of preliminary injunctions weighs in the balance of this case is perverted by the district court's conclusion that, notwithstanding the express public policy of H.B 2 giving primacy to implementation of S.B. 1 over the timing of the primaries, it is better situated to decide what is best for Texas taxpayers and voters. The public interest is embodied in the state's legislative choices which are simply disregarded by the district court. Additionally, the district court burdens the public interest of Texans by setting in motion a court-ordered plan which means that every Texas Senator will have to run again in 1993. Implementation of S.B. 1 instead of the court-ordered plan would heighten the possibility that this time around is the last time this decade that all thirty-one Texas senatorial positions will be open. *See* Article III, § 3, of the Texas Constitution (requiring that any reapportionment opens all positions for election).

Finally, the evidentiarily untested court-ordered plan contains an unexplained 9.98% maximum population deviation. This deviation flies in the face of this Court's directives that court-ordered redistricting plans must contain only *de minimis* population variations among districts. *See Connor v. Finch*, 431 U.S. 407, 414 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975). Thus, the district court has supplanted a legislatively enacted, precleared plan with its own plan which on its face fails to satisfy constitutional one-person, one-vote standards.

The prima facie validity of S.B. 1 is untouched by the record or the district court's findings in this case. What the record and the district court's own words in its January 10th order reveal is not the affording of presumptive validity and deference by a federal court, but instead the overly exuberant application of the district court's policy preferences in the area of redistricting.[9] Reversal is required in such circumstances.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's preliminary injunction of January 10, 1992 (and subsidiarily of December 24, 1991) insofar as it enjoins use of S.B. 1 and requires use of the court-ordered Senate redistricting plan. Upon reversal, the Court should remand the matter to the district court with instructions that it reschedule all or part of the party primaries set for March 10, 1992, to a later time, and that it permit the use of S.B. 1 in such rescheduled primaries, as well as the general elections in November, 1992.

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[9] Clouds of confusion still hover over aspects of the district court's orders. *See* N.Y. Times, Jan. 26, 1992, § A, at 12 ("Texas Remapping Battle Heats Up, Threatening to Singe the Democrats"); Dallas Morning News, Feb. 1, 1992, § A, at 1 ("Morales investigates call between lawmaker, judge").

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February, 1992

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

91-1270

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, Governor of Texas, et al.,
Appellants,

v.

LOUIS TERRAZAS, et al., *Appellees*..

On Appeal from the United States District Court for the Western District of Texas

---

MOTION FOR EXPEDITED CONSIDERATION OF JURISDICTIONAL STATEMENT

Ann Richards, Dan Morales, and John Hannah, Jr., respectively the Governor, the Attorney General, and the Secretary of State of Texas (appellants herein and hereinafter collectively termed "the state"), hereby move the Court to expedite its consideration of the jurisdictional statement filed in this appeal. Specifically, the state moves for immediate distribution of its jurisdictional statement (filed simultaneously with this motion) by the Clerk to the Court for its consideration without awaiting appellees' responses. The grounds follow:

1. This appeal seeks to reverse a divided three-judge district's court preliminary injunction order of January 10, 1992, compelling the state to use an interim court-ordered redistricting plan for the 31-member Texas Senate instead of a legislatively

approved plan (called Senate Bill 1) which has received administrative preclearance pursuant to section 5 of the Voting Rights Act.

2. The appealed district court injunction by its terms applies only to the 1992 party primaries. Under the court order, those primaries must go forward on March 10, 1992. Under Texas law, personal appearance early voting for the March 10th primary (a form of absentee voting) commences on February 19, 1992.

3. The Jurisdictional Statement enumerates two glaring deficiencies in the court-ordered plan for the rapidly approaching state Senate primary. The two-member majority's January 10th order completely disregards federalism-based restraints on federal courts. It rushes to supplant a precleared legislative plan with a court-ordered plan which has not been precleared, has not been examined in an evidentiary hearing, and which violates (without explanation) the population deviation limits imposed by the constitutional one-person, one-vote standard.

4. Additionally, remarkable and highly disturbing information has come to light within the last day which casts such a pall over the court-ordered plan as to vitiate it as a viable court order. A member of the Texas House of Representatives (who voted against Senate Bill 1) testified under oath in a deposition on February 3, 1992, that one of the panel members of the district court -- Judge James Nowlin -- telephoned him *ex parte* at his home on the morning of December 23, 1991, requesting that he (the Representative) help the judge's law clerks that day work on the Senate redistricting plan which the district court was developing. The Representative further testified that he did so with specific attention to the Senate district in which

he planned to seek a Senate seat. The next day, December 24, 1991, the divided district court first ordered the state to use the court-ordered plan for the Texas Senate in its 1992 primary elections. In other words, unbeknownst to the state and without any notice, a state representative helped the district court draw at least a portion of the court-ordered Senate plan which has been imposed on the state in lieu of its own legislatively-approved, administratively precleared plan. (Excerpts from the deposition are attached and incorporated.)

5. As revealed in paragraph 2, above, the time for the Court's action on the state's Jurisdictional Statement is extremely short. The plan forming the subject of this appeal is subject to grave infirmities, both of a legal and an ethical nature going to the integrity of the judicial process. Permitting the March 10th Senate primary elections to go forward under the circumstances here, with the growing indications of a corrupted judicial process, would constitute the gravest of offenses in the annals of voting rights law to the historic rights of states to choose their own systems of governance. Only exceedingly prompt action by this Court can restore order and fairness to the process; only exceedingly prompt action by this Court can avert the disaster to federalism which will occur if the challenged court-ordered Senate plan remains in place for the primary which is only a month away. Wholly independent of the questionable atmosphere surrounding the court-ordered plan, there are strong legal grounds for invalidating it. The state urges the Court to act on them as soon as possible.

For the foregoing reasons, the state urges the Court to expedite its consideration of the Jurisdictional Statement.

Respectfully submitted,

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February 4, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOUIS TERRAZAS, ET AL, Plaintiffs	*	
	*	Civil Action Nos.
VS.	*	A-91-CA-425
	*	A-91-CA-426
BOB SLAGLE, ET AL, Defendants	*	A-91-CA-428

ORAL DEPOSITION OF GEORGE B. PIERCE

February 3, 1992

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* * * * * * * * * *

DEPOSITION UPON ORAL EXAMINATION of the witness, GEORGE B. PIERCE, in answer to questions propounded to him in the above numbered and styled cause, taken on behalf of the Defendants before EDWARD Y. ESTRADA, a Certified Shorthand Reporter for the State of Texas, in the offices of Federal Court Reporters, 100 N.E. Loop 410, Suite 575, San Antonio, Texas, on the 3rd day of February, 1992, between the hours of 2:00 p.m. and 5:00 p.m., pursuant to Notice and the Federal Rules of Civil Procedure.

* * * * * * * * * *

Q. Okay, December. If you're using the work station, then at least two people will see you -- at least the receptionist and operator; is that correct?

A. I would think that's right.

Q. Are you familiar with a woman named Tina Hankst?

A. I have met Tina Hankst, yes.

Q. And who is she?

A. She is an operator.

Q. What about a Bryan Murdock? Are you familiar with a Bryan Murdock?

A. No I'm not.

Q. What about a Richard VanHaught? Are you familiar with him?

A. No, I'm not.

Q. Did you ever request a specific operator?

A. No.

Q. Now, you've told us who had access to your account. Were you ever given access to any account other than your own?

A. No.

Q. Were you ever allowed to view the Court's account?

A. Yes.

MR. BROWN: Counsel, what do you mean by the Court's account? Are you talking about the United States District Court in the Terrazas Versus Slagle case?

Q. (BY MR. COGGINS) I'm talking about the United States District Court, Court's acount?

A. What do you mean by account?

Q. The Court's file.

THE WITNESS: I think he needs to be more specific.

MR. BROWN: I don't understand red apple, so I don't know what it is.

Q. (BY MR. COGGINS) Okay. I'll try to be more specific.

Mr. Pierce, you know that the Court received an account on red apple, do you not?

A. That's right. I understood -- well, never mind.

Q. I'm sorry, I didn't mean to cut you off.

A. Go on.

Q. So just as you had a password and you could call up your file, the Court has a password and it could call up its file; is that correct?

A. I presume they treated the Court the same way they did everybody else.

Q. Were you ever given the Court's password?
A. No.
Q. Were you ever allowed to view any Court plans on the screen in the work station?
MR. BROWN: Counsel, what do you mean by a Court plan? Are you talking about what came out in the Court's order of December 24th or are you talking about something different?
MR. COGGINS: I'm talking about a plan being worked on by a law clerk.
THE WITNESS: Answer it?
MR. BROWN: You can if you wish.
A. Yes.
Q. (BY MR. COGGINS) And when did this occur?
A. I think it was on Monday the 23rd.
Q. And where did this occur?
A. At the red apple.
Q. But I mean, there are different work stations. Are you familiar with work stations one, two, three? Can you recall what work station it was?
A. No, I can't because you can enter from one side or the other.
Q. Each of the work stations was a room; is that correct?

A. Right.

Q. And who was in this room with you on December 23rd you talked about?

A. There was an operator. And one of the clerks for the committee -- not the committee but the Court.

Q. Can you recall the name of that clerk?

A. J.D. Munn.

Q. And Mr. Munn is a clerk for whom?

A. Judge Nowlin.

Q. Did you and Mr. Munn go to the work station together?

A. No.

Q. Did you have an appointment to go to the work station on December 23rd, 1991?

A. No.

Q. Who made the appointment to go to the work station on December 23rd, 1991?

MR. BROWN: Don't speculate.

A. I don't know. I presume the Court did.

Q. (BY MR. COGGINS) Did you arrange to meet Mr. Munn at the work station on December 23rd, 1991?

A. I was asked to be there, yes.

Q. Who asked you to be there?

A. The judge.

Q. Was this conversation just between you and Judge Nowlin?

A. As far as I --

Q. When did this conversation take place?

A. On the 23rd.

Q. Was it by telephone?

A. Yes.

Q. Then to your knowledge, you and Judge Nowlin were the only parties to this conversation?

A. Probably. As far as I can recall, that's correct.

Q. What was the substance of this conversation?

A. There was a problem in Bexar County, and they were running on a deadline and wanted to know if it could be corrected.

Q. Okay. To the best extent possible, Mr. Pierce, I'm going to ask you if you can, can you remember what Judge Nowlin said to you in this conversation and what you said to him.

A. It's my understanding that there was an error that had been brought to the Court's attention in the plan that they were drawing, and they requested that I come over there and fix it.

And it had something to do with some missing census tracts or something in part of their plan.

Q. So Judge Nowlin asked you to go over to the work station and meet with his law clerk?

A. And get it fixed. And also there was -- the only way to say it, it was a division of the community interest in the way the clerks had come up with the map for Bexar County in that they had put Alamo Heights and Terrell Hills and all that area in the west side district in district 19, and he wanted that changed.

Q. By "he," Judge Nowlin?

A. Right.

Q. How long was your conversation with Judge Nowlin on the telephone on December 23rd, 1991?

A. I don't recall.

Q. Do you have any estimate at all?

A. It wouldn't have been long.

Q. Do you recall roughly when this conversation took place?

A. Well, I'm trying to think. It had to have been in the morning.

Q. He called you rather than you calling him; isn't that right?

A. Yes.

Q. Do you remember where you were when you received this telephone call from Judge Nowlin?
A. I might have been in my Austin office.
Q. Is that your committee office?
A. Yes.
Q. To your knowledge, were any of the parties to this lawsuit notified by Judge Nowlin that you were going to meet with his law clerk on December 23rd, 1991 at the work station?
A. I do not know.
Q. You have no knowledge that any other parties were notified?
A. I have no knowledge of that at all.
Q. How long were you and J.D. Munn at the work station?
A. It wasn't long. They corrected the problems they had in the map with the missing census tracts, and then I pointed out to them where the Alamo Heights-Terrell Hills area was in San Antonio.
Q. You mean J.D. Munn couldn't find where Alamo Heights is?
A. He is not from San Antonio. He is from Midland.
Q. Was there an operator with you the entire

time that you and Mr. Munn were in the work station together?

A. Yes, that's right.

Q. Can you recall that operator's name?

A. I'm going to tell you just as honest as I can. What I read in the newspapers and everywhere, it was supposedly Tina Hankst, and I can't tell you for sure that I know that's who that was.

Q. Can you recall whether it was a male or female?

A. It was a female.

Q. Can you describe this person to us?

A. Not really. It's dark in there.

Q. Can you recall whether this operator stayed with you and Mr. Munn for the entire time you were working together in the work station?

A. Yes. They never leave.

Q. Was there anybody in the work station other than you, the operator, and Mr. Munn on December 23rd, 1991?

A. I don't recall. I don't think so.

Q. So to the best of your knowledge, there were only three people in that room -- you, J.D. Munn, and the operator?

A. That's correct.

91-1270

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, *et al.*,
Appellants,

vs.

LOUIS TERRAZAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

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February, 1992

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 10, 1992 at 12:16 p.m.

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	

ORDER AND JUDGMENT

Before the Court is the State Defendants' Motion to Modify or Stay Judgment of December 24, 1991 said motion filed December 31, 1991. This Court has informed the plaintiffs that it would not take the motion under advisement pending expiration of the ten-day response time provided in the Local Rules and intends to rule on the instant motion before the 10th of January 1992. Plaintiffs filed their response January 8, 1991. Also before the Court is the State Defendants' Emergency Motion to Modify, Vacate, or Stay Judgment of December 24, 1991 said motion filed January 9, 1992. Upon review of the motions, and the entire file in this case the Court finds the motions lack merit and should be DENIED.

State Defendants seek a stay of this Court's Judgment entered December 24, 1991 in which the Court ordered the 1992 primary elections be held pursuant to the Court's interim plans fashioned for the

Texas House and Senate.[1] These plans were adopted by necessity upon this Court's finding that the legislatively-drawn plans redistricting those bodies potentially fail to adequately represent minorities as guaranteed by the Voting Rights Act. The State Defendants argue that once a federal court holds a state's election law contravenes the requirements of the Voting Rights Act, "the unbroken thread running through the federal law of redistricting and voting rights" requires this Court to allow the legislature to cure the defects in its redistricting plans before elections may be conducted pursuant to a Court-ordered plan. In light of the recently-concluded special session of the Texas Legislature, specifically called to attempt to pass new plans redistricting seats of the Texas House and Senate, Defendants argue this Court should stay its Judgment in the event new plans are passed, and those plans receive preclearance by the Department of Justice and pass review by this Court after hearing, all to occur before January 10, 1992.[2] While this is a correct statement of the law regarding the imposition of permanent election plans, the cases cited by the State Defendants in support of their motion also impart the

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1 Defendants do not seek to stay the portion of this Court's Judgment implementing on an interim basis the plan passed by the Legislature redistricting seats for the U.S. Congress.

2 As evidenced by the testimony of the Texas Secretary of State, January 10, 1991 is a critical deadline, it being the latest filing date possible that would allow the 1992 primary election to proceed as scheduled under the State's statutory scheme. R. at 94; see also Defendant's Exhibit 13.

bedrock principle that federal courts possess considerable latitude in affording interim relief that might otherwise exceed the traditional constraints of comity and deference to the Legislature--primarily to insure that elections take place as scheduled under valid state law. See, e.g., McDaniel vs. Sanchez, 452 U.S. 130, 150 n.30 (1981)(deference to legislature to devise acceptable replacement plan applies in normal case where legislature has adequate time to do so); Wise vs. Lipscomb, 437 U.S. 535, 540 (1978)(where imminence of state election renders legislative reapportionment impractical, federal courts may devise and impose interim redistricting plan pending later legislative action); Burns v. Richardson, 384 U.S. 73, 85 (1966) (imposition of interim plan falls clearly within court's discretion to ensure elections proceed as scheduled, particularly where plan does not remain in effect after legislature adopts acceptable permanent plan); Reynolds vs. Simms, 377 U.S. 433, 586 (1964) (district court did not abuse discretion by imposing provisional plans so upcoming primary elections could proceed as scheduled, after legislature failed to apportion itself within parameters set by U.S. Constitution); Seastrunk v. Burns, 772 F.2d 143, 151 (5th Cir. 1985) (deference to legislature stops at point court finds plan illegal under federal law, or where preclearance has not been obtained); Jones v. City of Lubbock, 727 F.2d 364, 387 (1984) (court free to impose substitute plan after hearing and upon entry of findings holding legislative scheme violates federal law); Terrazas v. Clements, 537 F. Supp.

524, 527-528 (N.D. Tex. 1982) (panel implemented interim plans to prevent delaying elections). The United States Supreme Court refused to stay the Order in Terrazas. Terrazas v. Clements, 456 U.S. 902 (1982).

In the present case, this Court's December 24, 1991 Judgment does no more than provide for the holding of 1992 elections as scheduled under Court-ordered interim plans that temporarily address voting rights deficiencies in the plans passed by the Texas Legislature. In denying the stay, this Court in no way intends to limit the efforts of the Legislature in adopting acceptable permanent plans at any time it sees fit. Early in the second called Session, the Texas House approved this Court's interim plan redistricting that body for the 1992 primary elections, and fashioned a substitute permanent plan to be implemented for the 1994 elections. The Texas house indicated it approved the Court plan in order to guarantee that the elections go forward as presently scheduled. The objectives of the Texas Senate do not appear to be as clearly directed solely to the interests of Texas voters.

This Court fully recognizes that it should refrain from supplanting the policy choices of the Texas Legislature as expressed in HB 150 and SB 31 to the extent this Court has not found those choices in violation of federal law. It is evident that this Court has been able to do so to the satisfaction of the Texas House. With regard to the Texas Senate, it is not evident that the Senate's dispute with this Court's interim plan centered on fair representation of minority interest; rather, it appears the Senate was primarily interested in fashioning

a plan that better protects certain Anglo incumbents at the expense of minority voters' ability to elect candidates of their choice. This Court comes to such conclusions having reviewed the Senate plan submitted to this Court and the Department of Justice on the eve of the filing deadline, yet sees no indication that the Senate is attempting to devise a plan that would enhance minority voting strength over that provided in this Court's interim plan. As admitted in Defendants' January 9, 1992 motion, this substitute plan ("S.B. 1") adopted by the Legislature is identical to the one submitted by the parties in the Quiroz case in Hidalgo County. That "Quiroz plan" was before this Court during the period in which it reviewed SB 31, found that law in violation of the Voting Rights Act, and drafted its interim plan. Had this Court believed that the "Quiroz plan" better addressed the interests of minority voters its plan would have more closely mirrored the Senate districts drawn by the parties in Quiroz.

A detailed comparison of the Court's interim plan with the "Quiroz plan" reveals that the Court's plan, and not Quiroz, provides a greater opportunity for all minority citizens of the State of Texas to elect representatives of their choosing. A cursory examination of the bottom line support this assertion: both Quiroz and the Court's interim plan create nine minority majority districts, but the Court's interim plan also creates a minority impact district in the Dallas - Fort Worth metropolitan area that is lacking in the Quiroz plan. Additional hearing and evidence is not necessary for this Court to determine that the Legislature's adoption of Quiroz is not a response to

minority concerns, but an impermissibly partisan reaction to this Court's superior interim plan.

In the South Texas and Bexar County area, it appears that the plans are comparable in providing minorities an ability to elect representatives. Two of the six minority majority districts appear to be stronger under the Court's plan than under the "Quiroz plan," namely districts 20 and 21. Under the Court's plan, 59.7% of the voting age population ("VAP") in District 20 in Hispanic, while 59.4% of the VAP in District 21 is Hispanic. The numbers for the comparable districts under the "Quiroz plan" (districts 20 and 19) are lower -- only 57.1% and 58.2% respectively. District 27 under the Court's interim plan also appears to better address minority concerns. The Hispanic VAP in District 27 is 76.8% under the Court's plan, lower than the 78.6% present to the "Quiroz plan's" District 27. In light of the testimony at the December hearing that District 27 was "packed" under SB 31, this Court feels that its interim plan better responds to minority concerns regarding district 27.[3] This Court further notes that the Democratic incumbent currently residing in that district, Senator Eddie Lucio, voted against SB 1.

The "Quiroz plan" and Court plans appear to provide comparable protection of minorities in two of the three remaining minority majority districts in the South Texas-Bexar County area. District 24 under the Court's plan has

---

3 District 27 under both SB 31 and Quiroz have the identical Hispanic VAP of 78.6%.

a combined minority VAP of 61.3%; the corresponding district under Quiroz had an almost identical combined minority VAP of 61.5%. Similarly, District 29 under the Court's plan has a combined minority VAP of 69.6%, while District 29 under the "Quiroz plan" only marginally increases the combined minority VAP to 70.3%. The only district in which the "Quiroz plan" appears to provide significantly greater protection to minorities is District 26, which has an Hispanic VAP of 59.7% and a combined minority VAP of 65.8%. The corresponding district under the Court's interim plan is District 19, which has a lower Hispanic and combined minority VAP of 55.8% and 60.2% respectively. Given that District 19 remains a strong minority majority district under the Court's plan, this Court does not find this one district to be fatal to its plan. This Court further finds that the Democratic incumbent presently residing in this district, Senator Frank Tejeda, voted against the "Quiroz plan" stating to the print media that Quiroz impermissibly split the Black voters in Bexar County.

In Dallas and Harris counties, the other two counties with minority majority districts, it also appears that the Court's plan better protects the interests of minority voters. In Harris County, both plans create two minority majority districts, one commonly referred to as the "Black district" (designated as District 13 under both plans), and the other referred to as the "Hispanic district" (designated as District 15 under the Court's plan and District 6 under Quiroz). The Black district is significantly stronger under the Court's interim plan, with

a Black VAP seven percentage points higher and a combined minority VAP nine percentage points higher than that provided under the "Quiroz plan". While the Hispanic district has a higher Hispanic VAP under the "Quiroz plan" than under the Court's plan (57.1% as compared to 51.5%), the combined minority VAP's are virtually identical under the two plans (66.9% as compared to 66.8%). In light of the testimony given at the December hearing that minority coalition voting does exist in Harris County, we are not convinced that the Hispanic district under the "Quiroz plan" is significantly stronger. We are convinced, however, that the Court's interim plan better protects minority interests in Dallas and Tarrant counties. Both the "Quiroz plan" and the Court's plan contain a minority majority district (District 23), with almost identical combined minority VAPs of 64.4% and 64.5%, respectively. The Court's plan, however, also provides for a minority impact district spanning Dallas and Tarrant Counties with a combined minority VAP of 48.5%. The "Quiroz plan" contains no such corresponding impact district.

In the absence of any laudable benefit to minorities, the Senate has only engaged in time-consuming partisanship. While such partisan goals may represent the policy choices of the Texas Senate, this Court finds it should not defer to those policies where doing so would result in postponement of the 1992 primary elections and the consequent tremendous drain on the public treasury for the apparent benefit of so few.

Any attempt by this Court to implement the substitute plan drafted by the Senate for the 1992 primary elections will necessarily and needlessly result in postponing those elections until at least mid-April of 1992. Under Texas law, a bill passed by a mere majority of both houses of the Legislature does not become effective as law until 90 days after adjournment of the session in which it was enacted. TEX. CONST. art. III, § 39. This would include the proposed substitute plan, any statutory scheme aimed at avoiding this Court's Orders, as well as any enactment modifying the Texas Secretary of State's authority to reschedule elections on his own initiative. Here the Court is faced with either abiding by existing state law, i.e. the present statutory scheme calling for a March 10, 1992 primary election date, or suspending all proceedings until the Legislature's new proposal postponing the elections takes effect. This Court is not persuaded that it must be held hostage to the "ninety-day rule", the effect of which would prevent this Court form relying on existing state law. What is left before the Court for review is legislative intent regarding the treatment of minorities and the rescheduling of elections. As discussed supra, this Court has found that minority voting rights can be enhanced to a greater degree than provided in a Quiroz-style plan. As for the rescheduling of elections the Court is of the following opinion.

Defendants seek relief similar to that discussed in Judge Garwood's dissent in part, though a careful reading of that dissent reveals that Judge Garwood was also

concerned that the primary elections proceed as scheduled, but wished to make this Court's Judgment conditional on the Legislature's ability to obtain preclearance of any substitute plan from the Department of Justice, and favorable review of that plan by this Court, all before the present filing date of January 10, 1991, or by some postponed date approved by the Department in advance. As evidenced by plaintiff's supplemental record filed January 6, 1991, it is apparent that the Department of Justice does not intend to "rubber stamp" the Senate's substitute plan even if it is identical to a previous submission that received preclearance. As part of that record, Assistant Attorney General John Dunne specifically states that any new plan submitted by the State of Texas for preclearance must now be judged against the standard of this Court's interim plan for the Senate, and that any decrease in minority voting strength in the new plan from that afforded by the Court's plan may give rise to a determination of discriminatory effect different from that reached under an identical plan reviewed in another context. Given the Department's present posture, it does not appear that preclearance of any substitute plans can be obtained in a timely fashion so as to allow the 1992 primaries to proceed in March as provided by existing state law. It is also clear that any plan drafted by the Legislature cannot circumvent the Sec. 5 preclearance requirement merely because it has obtained the blessing of a federal court. Sanchez, 452 U.S. at 153. In order for this Court and the parties to technically comply with the procedural requirements of

Sec. 5, and the effect of Texas law, the substitute Senate plan would not be submitted to the Department for review until after the enactment becomes law in April of 1992. As expressed by Mr. Dunne, the Department would then exercise its right to examine the plan and other materials submitted for a sixty-day period. Assuming preclearance was obtained at the end of that time, parties plaintiff could, upon proper motion, request this Court to conduct hearings on any objections to the substitute Senate plan. In that event, it is only remotely possible that the primary elections could take place before early summer of 1992, well after the half-way point of the presidential preference campaign season.

During the December 11, 1991 hearing, the Texas Secretary of State, John Hannah, Jr., testified that postponing the primary elections would cost the taxpayers "in the neighborhood of ten to fifteen million dollars." R. at 68. As the March 10, 1992 elections involve a presidential preference primary, Hannah further testified that postponing the elections for candidates to the Texas House and Senate could confuse voters and lead to their voting twice in one primary season, a possible felony under Texas law. R. at 69. Such confusion, his testimony continued, would also reduce voter turn out. R. at 77. Hannah also testified that postponing elections could void voter registration certificates should significant changes be made in voting precincts, which would further affect voter turn out. R. at 71. Of greater significance, Hannah also testified that moving the elections of May 1992 could have the effect of reducing

Hispanic voting in the Rio Grande Valley because of the migrant farm seasons. R. at 83. According to the testimony of the State Defendants' own witness, postponing the elections for candidates to the Texas House and Senate would disserve the very group of voters who remain the focus of the litigation in Hidalgo County, and whose voting strength was increased by this Court's interim plans after finding the legislatively drawn districts in The Valley did not satisfy the requirements of Sec. 2 of the Voting Rights Act.

Accordingly, this Court finds the stay should be denied to avoid postponing the 1992 primary elections as presently scheduled under valid state law for the following reasons. The attempts made by the Legislature to change the election dates in e event this Court does not adopt its plan for the Senate are not effective as law at the time of this Order. Any abatement of this Court's proceedings in order to allow those enactments to become law would delay the currently valid elections. As for the federal questions presented at this time, this Court further finds any attempt to adopt the legislatively-draw Senate plan would delay the elections since preclearance of that plan has not been obtained and there has been no indication that it will be obtained in time for the elections to proceed as scheduled. Until formal comment on the substitute Senate plan ("Quiroz plan") has been made by the Department of Justice, elections cannot proceed under the Legislature's proposed plan as scheduled under current state law. Alternatively, should the opinion of the Department of Justice issue in the next

few days, this Court has already reviewed testimony and other evidence on the Senate's substitute plan during the December hearings and finds it fails to satisfy the Sec. 2 requirements of the Voting Rights Act. Given the impending election schedule, this Court further finds that any attempt at this time to allow the Legislature to formulate a second substitute plan to cure the voting rights deficiencies is not required and would only unnecessarily delay the elections.

Absent Constitutional or federal statutory infirmity, this Court shall continue to avoid preempting state policy as expressed by the Legislature, despite its perception that those policies appear to be founded on purely partisan considerations. In unique circumstances, though, equity requires that deference be tempered by necessity. Implicity in the Supreme Court's willingness to vest a three-judge panel with the authority to decree that elections proceed on a timely basis is the recognition that the voting public is entitled to have some governmental body make a final determination that, at least temporarily, assures their ability to equally elect representatives of their choosing at the time set by law. After all, ensuring free and equal access to the ballot, not partisan considerations or the protection of incumbents, is the sole focus of federal law in e area of redistricting and reapportioning seats to legislative bodies. Should this Court stay its Judgment resulting in the postponement of elections, it is inevitable that new challenges to the substitute plans passed by the Legislature will be brought, and the litigation that has already consumed

consideration state and federal judicial resources will begin anew. A state court in Hidalgo County, for example, has already attempted to extend the filing deadline for candidates to the Texas House in order to accommodate litigation challenging HB 150 and SB 31 under Texas law. Were this Court persuaded by the State Defendants' argument that it must always allow the Legislature to cure the redistricting plans found in violation of the law by this Court, it is conceivable that the elections could be rescheduled ad infinitum. This Court will not further the State's attempt to use the thread of deference running through the federal law of redistricting and voting rights as a cordon preventing the voting public from expressing its collective will at the ballot until certain Anglo incumbents are more comfortable with their chances of success.

ACCORDINGLY IT IS ORDERED, ADJUDGED AND DECREED that the State Defendants' Motion for Stay is in all things DENIED, and that the 1992 primary elections proceed as presently scheduled under state law, with an election date of March 10, 1992;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that primary elections for the Texas Senate and Texas House of Representatives be conducted under this Court's interim plans attached as Appendices A and B to this Court's Judgment entered December 24, 1991;

IT IS FURTHER ORDERED that the candidate filing deadlines for the 1992 primary elections to all offices remains January 10, 1992.

IT IS FURTHER ORDERED that the Commissioners Court of Bexar County, Texas is included as a party to the Joint Motion for Interim Relief filed in the these causes December 6, 1991, and that Dallas County, Harris County, and Bexar County may consolidate their county election precincts as contemplated in that joint motion.

SIGNED AND ENTERED this 10th day of January, 1992.

s/s
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

s/s
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

GARWOOD, Circuit Judge, dissenting in part:

I respectfully dissent as to the Senate (Cause No. 91-CA-426). I would:

(1) Order a hearing on the Senate Plan (SB1 2nd CS) for early next week.

(2) Order that if before January 17 the Justice Department has determined that SB1 is not entitled to preclearance, the primary elections be held on the March 10 schedule and in accordance with our prior order.

(3) Order that if before January 17 the Justice Department has not acted with respect to preclearance on SB1, the primary elections be held April 11 pursuant to the schedule fixed in the legislation adopted earlier this month.

(4) Order that if the Justice Department preclears SB1 before January 17, this court should immediately issue its order with respect to whether SB1 complies with Section 2 of the Voting Rights Act and the United States Constitution; if it does, the primary elections should go forward March 10 on the basis of SB1 with appropriate modifications of the filing dates for the Senate; if it does not, this court's plan should be used for such elections.

Even though SB1 does not maximize minority representation and appears to do so to a lesser extent than the Senate plan previously ordered by this court, that does not necessarily mean that SB1 violates section 2. See Seastrunk v. Burns, 772 F.2d 143 (5th Cir. 1985).

(5) If as a result of the above the primary elections are to be held April 11, but if the Justice Department has

not precleared SB1 prior to February 18 (the date fixed in the legislation enacted earlier this month), or if we should find SB1 to be invalid under section 2 or the Constitution notwithstanding preclearance by the Justice Department, then the April 11 primary elections should be held using the plan previously ordered by this court.

(6) If the primary elections are to be held April 11 as per the above, the before February 18 the Justice Department preclears SB1 and we do not find it invalid under section 2 or the Constitution, then April 11 primary elections should be held using SB1 for the Senate.

Under McDaniel v. Sanchez, 101 S.Ct. 2224 (1981), we cannot pass on SB1 until the Justice Department has acted on it for preclearance purposes, but if it is precleared and we do not find it invalid, then McDaniel likewise teaches us we should give it appropriate legislative deference, notwithstanding the superiority of the plan ordered by this court.

s/s
WILL GARWOOD
UNITED STATE CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 13, 1992 at 2:01 pm

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	

AMENDED ORDER AND JUDGMENT

It has come to this Court's attention that certain minor factual errors were made in the explanatory portion of this Court's Order and Judgment of January 10, 1992. These errors do not in any way affect the decretal portion of that Order. To correct these errors, this Court hereby amends nunc pro tunc, five sentences on pages six and seven of its January 10, 1992 Order, as follows. The third sentence of the first full paragraph on page six[1] is amended to read as follows: "Under the Court's plan, 57.9% of the voting age population ("VAP") in District 20 is Hispanic, while 58.7% of the VAP in District 21 is

[1] Prior to this order the sentence read "Under the Court's plan, 59.7% of the voting age population ("VAP") in District 20 is Hispanic, while 59.4% of the VAP in District 21 is Hispanic."

Hispanic." The sixth sentence of that same paragraph[2] is similarly amended to read as follows: "The Hispanic VAP in District 27 is 76.9% under the Court's plan, lower than the 78.6% present in the "Quiroz plan's" District 27." In the second paragraph beginning on page 6 and continuing on page 7, the second and third sentences[3] are amended to read: "District 24 under the Court's plan has a combined minority VAP of 63.3%; the corresponding district under Quiroz had a slightly lower combined minority VAP of 61.5%. Similarly, District 29 under the Court's plan has a combined minority VAP of 70.1%, while District 29 under the "Quiroz plan" only marginally increases the combined minority VAP to 70.3%." The fifth sentence of that same paragraph[4] is amended to read: "The corresponding district under the Court's interim plan is District 19, which has a lower Hispanic and combined minority VAP of 56.3% and 60.5% respectively."

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2 Prior to this order the sentence read "The Hispanic VAP in District 27 is 76.8% under the Court's plan, lower than the 78.6% present in the "Quiroz plan's" District 27."

3 Prior to this order these sentences read "District 24 under the Court's plan has a combined minority VAP of 61.3%; the corresponding district under Quiroz had a slightly lower combined minority VAP of 61.5%. Similarly, District 29 under the Court's plan has a combined minority VAP of 69.6%, while District 29 under the "Quiroz plan" only marginally increases the combined minority VAP to 70.3%."

4 Prior to this order the sentence read "The corresponding district under the Court's interim plan is District 19, which has a lower Hispanic and combined minority VAP of 55.8% and 60.2% respectively."

No other portions of said Order and Judgment of January 10, 1992 are changed or affected.

SIGNED AND ENTERED this 13th day of January, 1992.

s/s
JAMES R. NOWLIN,
UNITED STATES DISTRICT JUDGE, for the COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 16, 1992 at 4:50 pm

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	CIVIL NO. A-91-CA-428

AMENDED ORDER AND JUDGMENT

Upon consideration of the materials appended to the State Defendants' Corrected Emergency Motion to Modify, Vacate, or Stay Judgment of December 24, 1991 in reference to Smith, Hidalgo, and Tarrant counties, this Court hereby amends its Order and Judgment of January 10, 1992, as previously amended January 13, 1992. The paragraph on page fifteen of the January 10, 1992 Order which read:

> "IT IS FURTHER ORDERED that the Commissioners Court of Bexar County, Texas is included as a party to the Joint Motion for Interim Relief filed in these causes December 6, 1991, and that Dallas County, Harris County, and Bexar County may consolidate their county election precincts as contemplated in that joint motion."

is hereby amended to read as follows:

"IT IS FURTHER ORDERED that the Commissioner Court of Bexar County, Texas is included as a party to the Joint Motion for Interim Relief filed in these causes December 6, 1991, and that Dallas, Harris, Bexar, Smith, Hidalgo, and Tarrant Counties may consolidate their county election precincts as contemplated in that joint motion."

No other portions of said Order and Judgment of January 10, 1992, as amended January 13, 1992, are changed or affected.

SIGNED AND ENTERED this 16th day of January, 1992.

s/s
WILL GARWOOD
UNITED STATES CIRCUIT JUDGE

s/s
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

s/s
WALTER S. SMITH, JR.
UNITED STATE DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 24, 1992 at 4:14 pm

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	CIVIL NO. A-91-CA-428

AMENDED ORDER AND JUDGMENT

Before the Court is the Motion for Leave to Intervene, filed on January 23, 1992 on behalf of Bob Aikin. Upon consideration of said motion, the Court is of the opinion and finds that Bob Aikin should be allowed to intervene for the limited purpose of the Court's consideration of the issues raised therein in the issuance of this Amendment to this Court's Orders of December 24, 1991 and January 10, 1992, as amended January 13, 1992 and January 16, 1992.

The previous Orders of this Court have deemed that the candidate filing deadline for the 1992 primary elections for all offices was January 10, 1992. Upon consideration of Bob Aikin's Motion for Leave to Intervene and the testimony of Bob Slagle at the Court's hearing of January 24, 1992, the Court is of the opinion that all individuals who attempted to file a withdrawal of

candidacy on January 9, 1992 or January 10, 1992, and also attempted but were not allowed to file for another office on or before January 10, 1992 because of the denied attempt to withdraw on those two days are hereby deemed to have withdrawn and to have filed for those respective offices which they attempted to file for (assuming their attempted filing had no fatal defect apart from the failure to their said attempted withdrawal).

The Court is also of the opinion and finds that any individual who attempted to file a withdrawal of candidacy after January 10, 1992, and on or before January 16, 1992 is hereby deemed to have withdrawn from the office for which that individual filed. This Order does not extend the candidacy filing deadline beyond January 10, 1992 in any circumstance; any attempted candidacy filings after January 10, 1992 are invalid.

IT IS SO ORDERED.

SIGNED AND ENTERED this 24th day of January, 1992.

s/s
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE, for the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed December 24, 1991 at 2:43 pm

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	CIVIL NO. A-91-CA-428

SUMMARY OPINION AND JUDGMENT

Before the Court is plaintiffs' motion for implementation of interim plan filed in cause number A-91-CA-425 on November 14, 1991; plaintiffs' request for implementation of interim plan filed in cause number A-91-CA-426 on November 27, 1991; Intervenor Simms and Lucio's request for implementation of interim plan filed in cause number A-91-CA-426 November 27, 1991; Intervenor Sibley's request for interim relief filed in cause number A-91-CA-426 November 27, 1991; and plaintiffs' request for implementation of interim plan and consolidated hearing filed in cause number A-91-CA-428 on November 27, 1991. On December 10, 1991 this Court began a nearly four-day hearing on these various motions at which time the argument of counsel, testimony of witnesses, and other evidence was offered into the record. Upon review of the motions, the

responses filed, the file of this case, and the evidence and argument presented at the hearing the Court is of the following opinion.

I. BACKGROUND

Rarely has the procedural background of a case been more convoluted or important than in the instant causes dealing with redistricting in Texas following the 1990 Decennial Census. On February 7, 1991 various individual Hispanic voters (Mena plaintiffs) filed suit in Hidalgo County District Court, 332nd Judicial District of Texas, challenging the figures published in the 1990 Decennial Census on the grounds that said figures grossly underrepresented the number of Mexican-Americans and African-Americans in Texas. This census undercount, the argument continued, could potentially operate to deprive these minority groups of their voting rights under article I, sections 3, 3a, 19 and 29 of the Texas Constitution. A census undercount case was also filed by the Mena plaintiffs in the United States District Court for the Southern District of Texas, later amended to include redistricting challenges. No significant action has taken place in the Southern District case, nor was a three-judge panel ever impaneled there. While the state lawsuit was underway, the Legislature reapportioned state senatorial and representative districts using the 1990 census without adjusting for any undercount. The Legislature later reapportioned congressional districts in House Bill 1 ("HB 1") also using unadjusted census figures. All three plans were submitted to the Justice Department for

preclearance as required by Sec. 5 of the Voting Rights Act.

Meanwhile, on May 23, 1991 plaintiffs Terrazas, Angelo, and Craddic ("Republican plaintiffs") filed three separate lawsuits invoking this Court's jurisdiction under the Voting Rights Act and Fourteenth and Fifteenth Amendments challenging the reapportionment scheme adopted by the State Legislature for the Texas House of Representatives, Texas Senate, and United States Congress in cause numbers 425, 426, and 428 respectively. A three-judge panel was convened in these cases on June 24, 1991. After the Republican plaintiffs filed their instant lawsuits, the Mena plaintiffs amended their state pleadings to challenge the validity of House Bill 150 ("HB 150"), (House), and Senate Bill 31 ("SB 31"), (Senate), to require that legislative districts be redrawn using adjusted population figures. The same various state officials (the "state defendants"), among others, were named as defendants in both state and federal cases. There were now both state and federal lawsuits running parallel attacks on the 1990 redistricting statutes passed by the Texas Legislature. As evidenced by the record in this case, these "parallel" suits would cross, intertwine, and tangle to the point that the next round of primary elections in Texas may not occur as scheduled without action by this Court.

It was the state case that first caused this Court to review the substance of the Republican plaintiffs' Complaints. On July 29, 1991 the State Defendants filed a motion to stay state court proceedings, requesting this

Court stay the Hidalgo County proceedings, arguing that a state court order requiring the State of Texas to use population number other than those reported in the 1990 Decennial Census could place the state defendants in the quandary of having to comply with a state court order that could eventually be found in contravention of federal constitutional principles by this Court. In the interest of avoiding such a state and federal constitutional conflict, the argument continued, a stay of state proceedings was warranted. Finding the defendants' posture did not entitle them to injunctive relief, this Court denied the motion by Order entered August 2, 1991. On August 5, 1991, the state court commenced hearing on the Mena plaintiffs' application for temporary injunction and partial summary judgment, with the state defendants, represented by the Attorney General, defending the validity of the reapportionment statutes passes by the Legislature.

On August 22, 1991 the state court granted plaintiffs' requested relief, declared the 1990 Decennial Census undercounted minority populations in Texas, and ordered the state to submit new plans using adjusted figures by September 30, 1991. The state promptly filed an appeal with the Texas Supreme Court, requesting a stay of the trial court proceedings pending the appeal. The Supreme Court granted the stay on September 24, 1991.

While the Attorney General had filed an appeal, he was actively working with the Mena plaintiffs in an attempt to resolve their differences with respect to the

Texas Senate. By October 7, 1991, nineteen of the state's thirty one senators unofficially approved an agreement settling the dispute with the Mena plaintiffs regarding the Texas Senate. Because the stay of the Mena proceedings remained in effect, plaintiffs filed a new lawsuit in Hidalgo County styled Quiroz v. Richards, and entered an agreed judgment in that case memorializing the senate settlement - all on the 7th of October, 1991. Part of that Judgment ordered that elections for the state Senate be held under the alternate districting plan agreed to by the parties in Quiroz. As a result, the Texas Secretary of State notified the Department of Justice ("DOJ") that SB 31, even though it had been passed by both houses of the State Legislature, would be withdrawn from consideration for preclearance, and that the Quiroz Senate plan would be promptly substituted in its place. SB 31 had been before the DOJ for 59 days when the Secretary of State removed it from consideration.[1] The DOJ granted preclearance approval of the Quiroz plan on November 18, 1991. Though they had been defenders of SB 31 throughout the trial proceedings, as far as the State Defendants were concerned the Quiroz plan was now the law under which elections would take place for the Texas Senate.

As the procedural shenanigans continued to unfold in the state proceedings, this Court issued various

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1 Sec. 1973c requires the DOJ to grant preclearance or issue its objections within 60 days of submission of the proposed voting change.

scheduling orders commanding the parties in the instant causes to submit briefs and proposed interim plans for review in the event preclearance would not be obtained in time for the 1992 primary elections to proceed. On October 9, 1991 the Republican plaintiffs requested a temporary restraining order with this Court seeking to enjoin the State from substituting the Quiroz plan with the DOJ in place of SB 31, and further enjoin the state defendants from engaging in similar settlement activities that could result in HB 150 being replaced by another agreed plan.[2] A hearing on this motion was held October 23, 1991, and is maintained under advisement to date. The Republican plaintiffs also challenged the Quiroz plan in a mandamus action before the Texas Supreme Court. Though Republican plaintiffs had never intervened in either of the state cases, the Texas Supreme Court found they had standing to challenge the activities of the Attorney General and the rulings of the trial judge, and conditionally granted the writ in a plurality opinion delivered December 17, 1991. Finding the Attorney General did not exceed his authority in negotiating the Quiroz and Mena settlements, the Court did find that it was an abuse of the trial judge's discretion to accept the Quiroz plan without any adversary proceeding given the

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2 The state parties that since reached a similar agreement with the Texas House plan, and have submitted their alternative plan to the DOJ for review. The DOJ had lodged objections to HB 150 by letter dated November 12, 1991, finding the plan passed by the Legislature diluted minority voting strength in several specific areas of the state. The Mena settlement for the Texas House purported to address concerns voiced by the DOJ.

tremendous public impact of such a judgment. The effect of this opinion was to void the Quiroz plan, place the Mena settlement for the House into question, and return the case to the trial court for a full hearing before entry of judgment.

This panel did not have the benefit of the views of the Texas Supreme Court when the parties in the instant cause came before it for hearing on what interim relief, if any, should be fashioned to ensure the 1992 primary elections proceed as scheduled under plans that pass muster under the Voting rights Act and the U.S. Constitution. As it stands at the time of this Opinion, there are no legal plans reapportioning seats for election to the Texas House or Senate that have been precleared by the DOJ. Only HB 1, the plan passed by the Legislature in special session reapportioning seats to the United States Congress, has received preclearance not been successfully challenged under state law. On December 20, 1991, the DOJ filed with this Court notice that it reserved formal comment on its views regarding SB 31 or whether the Mena settlement addressed its concerns with HB 150 until an unspecified date. Accordingly, this Court has reviewed HB 150, SB 31, and HB 1 in light of the Republican plaintiffs' claims, the concerns of parties amicus and Intervenors, the DOJ's objections to HB 150, and the requirements of the Voting Rights Act and Fourteenth and Fifteenth Amendments to the U.S. Constitution.

II. FEDERAL STANDARDS FOR REDISTRICTING

Title 42 United States Code Sections 1973 et. seq. were originally enacted by Congress in the Voting Rights Act in 1965. An attempt to increase the protection afforded minority voters under the Fourteenth and Fifteenth Amendments, the Act was further strengthened by amendment of Sec. 1973 ("Sec. 2") in 1982 by establishing a totality of the circumstances effects test for minority vote dilution. This forgiving standard alleviates a plaintiff's burden of proving discriminatory intent as traditionally required to prove a violation of the Fourteenth and Fifteenth Amendments. See City of Mobile, Alabama v. Bolden, 446 U.S. 53, 70 (1980). Section 1973 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the Unites States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, as provided in subsection (b) of this section. (emphasis added)
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class ben elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this

> section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. Sec. 1973 (West Supp. 1991).

This standard does not require that minority candidates be elected to public office in numbers equal to their percentage of voting age population. Rather, upon review of the totality of the circumstances, a plan redistricting legislative seats fails to satisfy the requirements to Sec. 2 if it: (1) dilutes the voting strength of a minority group populous and concentrated enough to constitute a voting majority in a single district by frustrating the electoral choices of the minority group due to the bloc voting of other voters in the district; or (2) the number of districts in which minority candidates may be successfully elected are reduced due to disproportionally "packing" that minority group into select districts. See Thornburg v. Gingles, 478 U.S. 30 (1986). Though Gingles dealt with vote dilution in the context of multimember districts, courts in this Circuit have adopted the use of its test in single-member district litigation. See e.g., Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989); Ewing v. Monroe County, Mississippi, 740 F. Supp. 417 (N.D. Miss. 1990). In Brewer, the Circuit held the standard in Gingles is essentially a threshold a plaintiff must cross before the Court reviews the propriety of a given plan under the totality of the circumstances test. Brewer, 876 F.2d at 450. Gingles also served to narrow the Court's review of the circumstances to focus on the extent minority groups have been able to elect candidates of their choice, and the

extent to which voting is polarized. Gingles, 478 U.S. at 48, n. 15. There is ample evidence in the record, including the concession of counsel for the State that there is a strong history of polarized voting in Texas.

Plaintiffs have also alleged all three reapportionment plans passed by the Texas Legislature are replete with partisan gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. Intervenor Sibley makes similar assertions, focusing particularly on one Senate district. In 1986, the United States Supreme Court in Davis v. Bandemer, 478 U.S. 109 (1986), held that partisan gerrymandering claims are justiciable, though if offered little hope that political plaintiffs might prevail on such claims. Under Bandemer, a plaintiff challenging a plan must show: the plan intentionally discriminates against a political group; the plan will have a long term disproportionate effect on that group's election of representatives; and the effect of the redistricting scheme as a whole consistently shuts out that group from the political process in that state. Id. at 141-143. This Court's analysis of the evolving law in this area falls outside the scope of this opinion, and the evidence before it at the present time. The parties may have ample opportunity to make a more complete record during the trial on e merits, which the Court presumes will not take place until after the 1992 elections.

A brief recitation of the responsibilities of the DOJ is also in order at this point. Since 1975, Texas has fallen within the scope of Sec. 5 of the Voting Rights Act which requires that any changes in voting law in a covered state

be precleared by the DOJ before they may be implemented. 42 U.S.C. Sec. 1973c (West 1981). A Sec. 5 review is primarily concerned with whether the proposed change causes a retrogression in minority voting strength, though DOJ guidelines currently require the plan to be scrutinized for noncompliance with Sec. 2 before preclearance may be obtained. See City of Lockhart v. United States, 460 U.S. 125, 133-134 (1983); Beer v. United States, 425 U.S. 130, 139-141 (1976); and 28 C.F.R. Sec. 51.54(a) (1991); 28 C.F.R. Sec. 51.55(b)(1991). The State also bears the burden of showing that the proposed voting change was not enacted with a discriminatory purpose. 28 C.F.R. Sec. 51.52 (1991).

Preclearance of a proposed plan does not bar a subsequent court proceeding brought under Sec. 2. 42 U.S.C. Sec. 1973c. Should this Court find that any of the plans fail to satisfy the federal requirements, it is within the ambit of this panel's discretion to draw remedial plans that may not otherwise comply strictly with the requirements for fashioning permanent remedies in order to ensure that elections proceed as scheduled. See Upham v. Seamon, 456 U.S. 37, 44 (1982).; Burns v. Richardson, 384 U.S. 73, 85-86 (1966). Any plan drawn by this Court is also exempt from the preclearance requirements of Sec. 5. Connor v. Johnson, 402 U.S. 690, 691-692 (1971).

III. REVIEW OF THE 1990 REAPPORTIONMENT PLANS

A. United States Congress

Republican plaintiffs challenge the following congressional districts drawn in HB 1: Districts 1, 2, 4, 5, 6, 8, 9, 13, 14, 17, 19, 21, 22, 23, 24, 28, 29, and 30. None of these districts generated an objection from the DOJ, and the plan received preclearance on November 18, 1991. Plaintiff's Exhibit 76. With regard to districts 1, 2, 4, 5, and 8, Republican plaintiffs assert that minority communities were split to protect Anglo Democrat incumbents. Upon review of the population data for the counties that comprise these districts, and comparison of the population analysis reports ("PAR Reports") for HB 1 and the Republican proposed plans, this Court finds there are not a sufficient number of minorities in the counties comprising these districts to enable minorities to elect a candidate of their choice, that HB 1 does not regress the number of minorities in the districts as drawn, and that the Republican plan actually has fewer minorities in their proposed districts resulting in an average Anglo voting age percentage of 81.48% compared with an average of 80.36% in HB 1. See Plaintiffs Exhibits 77a - g, and Exhibits 85a - g. Similar claims were lodged against districts 13, 17, 19, 21, 23, and 28, though in this instance the Republican plaintiffs argued the districts as drawn in HB 1 were drawn as the result of political gerrymandering. This Court finds the plaintiffs have offered no sufficient evidence in support of their political gerrymandering argument pertaining to these districts, and that they likewise contain an insufficient number of minority residents to support a finding that the districts as drawn dilute minority voting strength.

As for districts 6, 9, 14, 22, 24, 29, the Republican plaintiffs allege that districts 25 and 8 are regressed at the expense of creating district 29 as a Hispanic district, and that the other districts were drawn to dilute Republican voting strength. Again, the plaintiffs have offered little evidence in support of their political gerrymandering claims. A comparison of the minority voting age populations of districts 25 and 8 also reveals that the number of minorities residing in the counties comprising each district is insufficient to elect a candidate of their choice, and that the number of minorities placed in those districts under HB 1 does not serve to dilute the minority voting strength in adjacent minority majority districts 18 (Black) and 20 (Hispanic). District 20 is a new Hispanic congressional seat in Harris County. The percentage of minority voting age populations for the plaintiffs' proposed versions of the two minority seats in Harris County are within a percentage point of those in HB 1. See Court's Exhibit 1; Plaintiff's Exhibits 77a - g, and Exhibits 85a - g.

Plaintiffs' remaining challenges to HB 1 involve a minority district encompassing the Dallas metropolitan area. District 30 in Dallas County is a new minority majority district drawn to elect a Black congressional candidate. While the 61.5% Black and Hispanic voting age population ("VAP") is commendable, the configuration of District 30 closely resembles a microscopic view of a new strain of disease, and has been the subject of well-deserved national ridicule as the most gerrymandered district in the United States. Though this Court is

concerned with the flagrant abandonment of compactness and preservation of communities of interest in this district, the Court further finds that a primary motive for any gerrymandering was to enhance Black voters' ability to elect a candidate of their choice. The mere fact that the Republican plaintiffs have fashioned a more compact District 30 with identical voting age population percentages, though more aesthetically pleasing, does not give rise to a finding of a Sec. 2 violation by this Court at this time. This Court further finds that District 30 as drawn in HB 1 does not dilute the minority vote in adjacent districts, including Hispanics, as has been found in the House and Senate plans passed by the Legislature. For the reasons set forth in this section of the opinion, and the fact HB 1 has received preclearance from the DOJ, this Court finds plaintiffs' claims for preliminary relief fail to meet the standard for injunction to issue at this time, and that the 1992 primary elections for U.S. Congress may be conducted pursuant to HB 1.

B. Texas Senate

As discussed supra, there is presently no legally enacted state plan redistricting the Texas Senate that has received preclearance from the DOJ. Accordingly, this Court must scrutinize SB 31 for Sec. 2 and constitutional deficiencies as alleged in plaintiffs' complaint without the benefit of the DOJ's comments, if any, compiled during its 59 day review of that plan. Most of the issues raised in intervenors' complaints are either rendered moot by the Texas Supreme Court's December 17, 1991 opinion in

Quiroz, or are not relevant to this Court's review of SB 31 at this time. This Court specifically finds that the Quiroz settlement plan is not valid under state law, but merely an alternative proposal submitted to the Court that because of the actions of the Secretary of State happened to receive favorable review by the DOJ.

Plaintiffs challenge the validity of Senate districts 1, 2, 3, 4, 9, 12, 15, 17, 19, 23, 26, and 31. With regard to District 15, this Court is persuaded by plaintiffs' claim that SB 31 does not create a credible Hispanic senate district in Harris County, but actually dilutes minority voting strength by placing 50.8% voting age Hispanics in that district as compared to the district 15 fashioned by this Court with 51.5% Hispanic voters. Plaintiffs argue that minorities which could have been placed in district 15 to make it a stronger minority majority district were splintered into district 11 to protect an Anglo incumbent. This Court's interim plan also increased the Black VAP in District 15 from 14.9% to 15.9%, boosting the combined Black and Hispanic VAP in that district by almost 2%. Due to the configuration of Court district 15, the Court's interim plan also increased the Black VAP of District 13 from 50.4 to 57.2%. The combined effect of the Court's interim Districts 15 and 13 significantly increases the voting strength of minorities in Harris County by ensuring that both a Black and Hispanic state senator will probably be elected from Harris County. This probability was not as great under SB 31.

Turning to North Texas and the Dallas - Fort Worth metropolitan area, plaintiffs challenge districts 2, 9, 12,

and 23. Under SB 31, District 12 generally outlines the City of Fort Worth and contains 64.9% anglo VAP, with approximately 18% Black VAP and 15% Hispanic VAP. This district is presently held by an Anglo incumbent. District 23 as drawn by SB 31 is promoted as a strong Black district that outlines the center of Dallas County, with 44.2% Black VAP, and a combined Black and Hispanic VAP of 67.7%. This Court's review of these districts and the voting tabulation districts ("VTD's") they are comprised of indicates that District 12 could be drawn as a strong minority impact district without diluting the Black voting population's chances of electing a state senator in District 23. District 12 as fashioned by this Court takes the Hispanic community concentrated in West Dallas and part of Irving and links it with the Black community in south central Tarrant County. The result is a district with a combined Black and Hispanic VAP of 48.5%. Under the Court's interim District 12, minority groups will have a significantly greater impact than in District 12 as drawn by SB 31. The Court's interim plan also increases the Black VAP in District 23 almost 2% to 45.6%, while the combined minority VAP remains a greater degree of participation in the political process than under SB 31.

In order to ensure that district 23 contained the requisite number of Black VAP, the Court's interim plan takes a number of VTD's from District 2, presently held by an Anglo incumbent, forcing District 2 to seek population elsewhere in order to keep its deviation at an acceptable level. The configuration of the Court's interim

District 12 as a minority impact district also causes District 9 to be redrawn to include some of the population that SB 31 included in District 2 southeast of Dallas. Consequently, the addition of interim District 12 causes districts 1, 2, 3, 8, 9, 22, and 30 to be slightly adjusted. This Court's review of District 9 reveals SB 31 departed radically from the traditional configuration of that district. Because the Court's drawing of District 12 as a minority impact district makes the Legislature's version of District 9 impossible to reasonably approximate, the Court's plan largely restores that district to its traditional counties of composition, and has done so without unacceptably deviating from ideal population.

Plaintiffs' remaining challenges, and this Court's only other area of concern with SB 31, involve those districts drawn by the Legislature in South Texas and the Rio Grande Valley. All parties conceded at the December 13th hearing that SB 31 was perceived as "dead on arrival" at the Justice Department because the plan failed to create stronger Hispanic districts in Bexar County, or address the concerns of Hispanic voters in the districts running South to the U.S. - Mexican Border. SB 31 only create four (4) districts in South Texas that would appear to ensure election of a Hispanic candidate in that area. This Court concurs with those concerns, finds SB 31 likely does not comply with the mandate of Sec. 2 and interpretive case law, and has fashioned interim districts in those areas that afford Hispanics six (6) state Senate seats in South and West Texas. This Court specifically

finds that Districts 19 and 26 as drawn in SB 31 likely fails to meet the requirements of Sec. 2. Under the Court's interim plan the Hispanic districts include numbers 19, 20, 21, 24, 27, and 29. These numbers correspond to SB 31's districts 19, 20, 25, 21, 27, and 29 respectively. Under SB 31, District 25 is not a Hispanic district, yet this Court's interim District 21 approximates the same geographical area. The Court was able to craft its District 21 as an Hispanic district by absorbing part of SB 31's District 26, and allowing District 21 to extend further south by redrawing the three (3) districts running through the Rio Grande Valley.

Under SB 31, District 19, the Hispanic district wholly contained in Bexar county, offers 47.6% Hispanic VAP, with only 39.3% registered voters with Spanish surnames. This Court finds that District 19 as drawn in SB 31 likely fails to comply with Sec. 2's requirement that the minority group be able to elect a candidate of its choice, because the percentage of Hispanic voter turn out is too weak. This Court was able to fashion its interim District 19 to provide 56.2% Hispanic VAP, and 48.7% voters registered under a Spanish surname. District 20 in SB 31 boasts a 58.0% Hispanic VAP and accompanying 50.6% voters registered under Spanish surnames. This Court's interim District 20 almost mirrors those numbers, but it is drawn in such a way that Districts 24 and 21 may be drawn to create one district well above the deficient level provided in SB 31's District 26, and another district approximating the percentages in SB 31's District 21. For example, interim District 24 under

the Court's plan contains 54.2% Hispanic VAP with a 48.0% voters registered under Spanish surnames. SB 31's District 26 contained only 51.4% Hispanic VAP, and a remarkably lower 42.7% voters registered under Spanish Surnames. This Court notes that the overall percentages in its Hispanic districts are slightly stronger than those proposed in the Quiroz settlement plan that received preclearance by the DOJ.

Given the Court's substantial changes to the plans as drawn for South Texas, Dallas, and North Central Texas, unrelated districts are affected. In drawing the remainder of the State to accommodate the specific changes made by the Court plan, every attempt was made to place as many counties in the interim districts in the same numbered district as they would have been under SB 31. We consider ourselves to have been successful in this attempt, as fully half of the Senate Districts, namely those in West and East Texas, are substantially the same as under SB 31. The Court made every attempt to preserve the legislature's will in those areas of the state where no violations of the Voting Rights Act were found to occur.

C. Texas House of Representatives

On November 12, 1991 the DOJ issued its objections to HB 150 in a letter transmitted to the Texas Secretary of State. Noting the most significant demographic change in Texas in the past ten years to be the increase in Hispanic population, the DOJ's objections dealt wholly with the dilution of Hispanic voting strength in El Paso,

Bexar, and Dallas Counties, and voiced concerns with districts in the Rio Grande Valley and South Texas. Upon review of the letter and the DOJ's findings, this Court finds considerable merit in the specific objections and has attempted to fashion a remedial plan yet remain loyal to those portions of the state in which no DOJ objections were lodged. This was accomplished to a much greater degree than the Court's interim Senate plan because most House districts changed fell within whole counties and did not effect other lines running through the rest of the state. Other than those areas of the state touched by the DOJ's objections, this Court finds plaintiffs challenge to HB 150 fail given the state of the evidence before the Court at the present time.

Though the DOJ's objection to Dallas County is far from clear, this Court's review of Districts 99 through 114 as drawn in H.B. 150 shows that Hispanic voters were fragmented into various districts completely diluting their ability to a elect a candidate of their choice in any district in Dallas County. This Court further finds that the Hispanic population in Dallas County has grown significantly in the past ten years to the degree Hispanics as a voting group are capable to clearly electing a candidate of their choice in a minority majority Hispanic district, and participate significantly in the election of a candidate in an Hispanic impact district. This can be accomplished without diluting the ability of Black voters to elect at least four (4) candidates of their choice in Dallas County. In attempting to fashion such districts, this Court found its efforts remarkably paralleled those of

the Mena plaintiffs' proposals, and therefore adopts that portion of their proposed redistricting plan that encompasses Dallas County. Under the Court approved interim plan, District 104 is a Hispanic district yielding 58.5% Hispanic VAP, while District 103 is a Hispanic impact district offering 41.3% Hispanic VAP, and a combined minority VAP of 53.4%. Districts 100, 109, 110, and 111 remain at percentages strong enough for Black voters in those areas to elect candidates of their choice.

H.B. 150 apportioned El Paso County into five districts. The DOJ objected to HB 150's reduction of Hispanic population in District 76, presently held by an Anglo incumbent. Though District 76 lies between two districts with Hispanic VAP in excess of 80%, the DOJ found the Hispanic voter registration was reduced by about four percentage points without an adequate jurisdiction. This was particularly objectionable in light of the DOJ's finding that Hispanic voter registration had increased in that district over the past ten years, inferring the reduction was intended to protect an Anglo incumbent. Under this Court's interim plan, Hispanic population flowed from Districts 75 and 77 in order to increase the percentage of Hispanic VAP in District 76 from 66.7% to 72.0%. Districts 75 and 77 were reduced to Hispanic VAP's of 82.5% and 80.6% respectively. It is the opinion of this Court that the El Paso districts as drawn by the Court no longer dilute minority voting strength in District 26, and otherwise comply with Sec. 2.

The DOJ's objections to Bexar County focused on the apparent regression of Hispanic voting strength in District 117 resulting from the packing of Hispanics in District 118. While the DOJ did not object to the number of Hispanic seats drawn in H.B. 150 in Bexar County, which numbered five (5) with Hispanic VAP above 55%, this Court finds that an interim plan can and should be drawn to provide Hispanics seven (7) districts with Hispanic VAP above 55%. This Court further finds District 117 as drawn under HB 150 is not an Hispanic seat as the Hispanic VAP is well under 55%. This Court's interim plan for Bexar County essentially mirrors the proposals offered by the Mena plaintiffs. Their proposals had been submitted to the DOJ in an attempt to obtain withdrawal of the Department's objections.

Objections were also made to the districts drawn in H.B. 150 located south and southwest of Bexar County, and north of Cameron and Hidalgo counties. The Legislature drew district lines 43 and 44 in an east-west manner that had the effect of packing Hispanics in the southern districts and overpopulating Anglos in the northern districts. The DOJ noted that this problem would have been alleviated had the districts been drawn in a north-sought configuration, and that an additional Hispanic district could have been created. This east-west configuration was viewed by the DOJ as intended to protect an Anglo incumbent. Under H.B. 150, the Hispanic VAP of District 43 is 75.0% while the VAP of District 44 is only 46.9%. These districts as drawn by the Court maintain District 43 at 66% Hispanic VAP, while

increasing the Hispanic VAP in District 44 to 54.5%, and remedy the problems identified by the DOJ.

Finally, this Court concurs with the DOJ's objections to the reduction of Hispanic VAP in District 38 to protect an Anglo incumbent. This Court's interim plan moved Hispanics from District 36 into District 38, increasing the Hispanic VAP from 67.6% to 72.9%, while maintaining the Hispanic VAP in District 36 at 74.4%. In order to arrive at an acceptable deviation level, the Court also moved a small number of Anglo voters from District 38 into District 37. This change had no appreciable effect on the Hispanic VAP in District 37.

IV. JUDGMENT

It is the intention of this Court by this Opinion and Judgment to provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law, and by this Opinion and Judgment to provide for the holding of elections in Texas without delay and in accordance with existing state law. In developing equitable interim state legislative redistricting plans the Court has sought primarily to provide new or improved state House and Senate districts that provides a realistic opportunity for the election of racial and ethnic minority candidates. Any partisan effects resulting from this effort are apparently a natural and unavoidable consequence of the Court's emphasis on the interests of long-neglected minority concerns.

This Court has sought diligently, where appropriate, to adhere to the legitimate districting intent of the state legislature and, where federal constitutional and statutory prohibitions are not offended, to give effect to the will of that body. A conscientious inquiry, however, reveals even to the most casual political historian the long history of federal court intervention in Texas redistricting schemes in order to provide minimal protection to the electoral interests of racial and ethnic minorities. While past state legislatures have paid some tribute to these important interests, partisan concerns and preservation of incumbents appear paramount on the decennial legislative agenda. The time-honored effects of adherence to these more parochial concerns have sometimes been an unspoken disservice to minority representation.

As the Regular Session of the 72nd Legislature concluded with the approval of H.B. 150 and S.B. 31, those state officials charged with presenting these legislatively-approved plans to the Department of Justice for required Voting Rights Act preclearance seemed unusually lethargic. This inaction is a central reason for the need of federal judicial action at this time in an effort to protect minorities' constitutional and statutory voting rights.

The legislative history of H.B. 150 and S.B. 31, coupled with the leisurely presentation of the Justice Department provides this Court with no real hope that further deference to the legislature at this time would yield any result other than continued protection of some

members' self-interests to the exclusion of minorities' rights. For the interim, this Court will exercise its constitution responsibilities to provide protection to this latter group of often-neglected Texas citizens. Based on the findings and legal conclusions set forth in this Opinion it is the Judgment of this Court that the 1992 primary elections proceed as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-428 is DENIED, and that elections should proceed on an interim basis under the congressional plan as drawn in HB 1;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-Ca-426 is GRANTED, and that primary elections for the Texas Senate will be conducted under this Court's interim plan attached as Appendix A to this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-425 is GRANTED, and that primary elections for the Texas House of Representatives be conducted under this Court's interim plan attached as Appendix B to this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the candidate filing deadlines for the 1992 primary elections are extended to January 10, 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the residency requirement for candidates

to the Texas Senate, and Texas House of Representatives are hereby waived for elections held under the State House and State Senate interim plans in 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Joint Motion for Interim Relief filed in all three causes December 6, 1991 is GRANTED, and that election precincts may be consolidated as contemplated in those motions.

SIGNED AND ENTERED this 24th day of December, 1991.

s/s
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

s/s
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Garwood, Circuit Judge, dissenting in part:

I join the majority's judgment and its essential reasoning in all respects except as follows:

In light of the fact that the Texas legislature has recently been called into special session commencing January 2, 1992, for the purpose of redistricting, in may view this Court's Order should expressly provide that in the event legislation is enacted effecting alternate redistricting, and/or postponement of the 1992 primary elections, and such legislation is precleared by the Department of Justice, and found not invalid by this or another court if challenged, and all this transpires in time such that review thereof by the Department of Justice and by this Court can be had and thereafter the presently scheduled 1992 primary elections, or 1992 primary elections pursuant to any such postponed date (if any such postponement is timely precleared by the Department of Justice and not sooner found invalid by this or another court), may properly take place in 1992, then the interim plan adopted by this Court shall be of no force or effect as to the body or bodies so redistricted. I believe that this much is required by deference to the legislature in these matters. See, e.g., McDaniel v. Sanchez, 101 S.Ct. 2224, 2236 n.30 (1981).

SIGNED AND ENTERED this 24th day of December, 1991.

s/s
WILL GARWOOD
UNITED STATE CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 13, 1992 at 10:15 am

LOUIS TERRAZAS, et al.,	§	
	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
	§	A-91-CA-426
BOB SLAGLE, et al.	§	
	§	
Defendants.	§	

NOTICE OF APPEAL

Ann Richards, Dan Morales, and John Hannah, respectively the Governor, the Attorney General, and the Secretary of State of Texas, defendants herein (collectively, "State Defendants"), hereby appeal, and give notice of their appeal, to the Supreme Court of the United States of: (a) the order and injunction entered in the second full paragraph (not counting the runover paragraph from the preceding page) on page 25 of this Court's Summary Opinion and Judgment which was filed on December 24, 1991; and (b) insofar as its affects the Texas Senate, the entirety of this Court's Order and Judgment which was filed on January 10, 1992; and (c) the Court's Order and Judgment which was filed on January 10, 1992, to the extent it compels the state to

conduct all of its primaries on March 10, 1992, instead of on April 11, 1992, using Senate Bill 1.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

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ATTORNEYS FOR STATE DEFENDANTS

[CERTIFICATE OF SERVICE OMITTED]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 13, 1992 at 3:43 PM

LOUIS TERRAZAS, et al.,	§	
	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
	§	A-91-CA-426
BOB SLAGLE, et al.	§	
	§	
Defendants.	§	

AMENDED NOTICE OF APPEAL

Ann Richards, Dan Morales, and John Hannah, respectively the Governor, the Attorney General, and the Secretary of State of Texas, defendants herein (collectively, "State Defendants"), hereby appeal, and give notice of their appeal, to the Supreme Court of the United States of: (a) the order and injunction entered in the second full paragraph (not counting the runover paragraph from the preceding page) on page 25 of this Court's Summary Opinion and Judgment which was filed on December 24, 1991; and (b) insofar as it affects the Texas Senate, the entirety of this Court's Order and Judgment which was filed on January 10, 1992, as amended on January 13, 1992, in the Amended order and Judgment; and (c) the Court's Order and Judgment

which was filed on January 10, 1992, as amended on January 13, 1992, in an Amended Order and Judgment, to the extent it compels the state to conduct all of its primaries on March 10, 1992, instead of on April 11, 1992, using Senate Bill 1.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

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[CERTIFICATE OF SERVICE OMITTED]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed February 3, 1992 at 2:40 pm

LOUIS TERRAZAS, et al.,	§	
	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
	§	A-91-CA-425
BOB SLAGLE, et al.	§	
	§	
Defendants.	§	

SECOND AMENDED NOTICE OF APPEAL

Ann Richards, Dan Morales, and John Hannah, respectively the Governor, the Attorney General, and the Secretary of State of Texas, defendants herein, hereby appeal, pursuant to 28 U.S.C. § 1253, to the Supreme Court of the United States: (i) the order and injunction entered in the second full paragraph (not counting the runover paragraph from the preceding page) on page 25 of this Court's Summary Opinion and Judgment which was filed on December 24, 1991; and (ii) the order and injunction entered with regard to the Texas Senate in the last full paragraph on page 14 of this Court's Order and Judgment which was filed on January 10, 1992 (incorporating the order and injunction specified in (i), above; and (iii) insofar as it affects the Texas Senate,

denies the motion to modify or vacate its December 24, 1991, order affecting the Texas Senate, and compels the state to conduct all of its primaries on March 10, 1992, the entirety of this Court's Order and Judgment which was filed on January 10, 1992, as amended on January 13, 16, and 24, 1992, in amended orders and judgments.

Respectfully submitted,

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Attorney General of Texas

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[CERTIFICATE OF SERVICE OMITTED]

42 U.S.C. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United

States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to

reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

Defendant's Exhibit 27

November 18, 1991

Honorable John Hannah, Jr.
Secretary of State
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to the modified 1991 Senate redistricting plan entered pursuant to the Agreed Final Judgment in Quiroz v. Richards, C.A. No. C-4395-91F (Dist. Ct. Hidalgo Cty., 332nd Dist. Ct.) for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on October 8, 1991; supplemental information was received on October 15, and 29, and November 1, 13, and 15, 1991.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. Although we have found that your initial submission was not complete, in an effort to expedite our review, as you requested, we have sought additional information informally and we are providing a determination within the 60-day period following your initial submission.

The Attorney General's review of voting changes occasioned by redistricting is governed by Section 5 of the Voting Rights Act, which requires that the submitting authority demonstrate that the proposed change has neither a discriminatory purpose nor a discriminatory effect on account of race, color or language minority status. Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, preclearance may not be obtained if implementation of the change would clearly violate Section 2 of the Act. 28 C.F.R. 51.55.

Based upon that review authority, the Attorney General does not interpose any objection to the submitted redistricting plan. As authorized by Section 5, however, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the 60-day review period. See 28 C.F.R. 51.43.

While we are preclearing this plan under Section 5, the extraordinarily convoluted nature of some districts compels me to disclaim any implication that our preclearance establishes that the proposed plan is otherwise lawful or constitutional. I understand that litigation challenging the legal and constitutional propriety of various districts is pending. Terrazas v. Slagle, No. 91-CA-426 (W.D. Tex.). Our preclearance of the submitted redistricting plan in no way addresses the state's approach to its redistricting obligations other than with regard to Section 5. Indeed, Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See 28 C.F.R. 51.41.

Sincerely,

s/s
John R. Dunne
Assistant Attorney General
Civil Rights Division

Plaintiff's Exhibit 1

November 12, 1991

Honorable John Hannah, Jr.
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Chapter No. 899 (1991), which provides the 1991 redistricting plan for the House of Representatives of the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on September 12, 1991; supplemental information was received on September 17 and 23, October 29, and November 1, 4, and 8, 1991.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. At the outset, we note that the state waited nearly three months before seeking the requisite preclearance under Section 5 for the House redistricting plan. Although we have found that your initial submission was not complete, in an effort to expedite our review, as you requested, we have sought additional information informally and we are providing a determination within the 60-day period following your initial submission.

The Voting Rights Act requires that the submitting authority demonstrate that the proposed change neither has a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, preclearance may not be obtained if implementation of the change would clearly violate Section 2 of the Act. 28 C.F.R. 51.55. In the case of a statewide redistricting, Section 5 requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in adopting the particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52(a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the legislature has deferred to the interests of incumbents while refusing accommodate the community of interest shared by insular minorities. See, e.g., Garza v. Los Angeles County, 913 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1408-09 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Such concerns are frequently related to the unnecessary fragmentation of minority communities or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular jurisdiction's need to redistrict (id.). Finally, our entire review is guided by the principle that the Act insures fair election opportunities and does not require that any jurisdiction attempt to guarantee racially or ethnically proportional results.

Turning now to the instant submission, the state House is composed of 150 members elected from single-member districts. Accordingly, the House plan required redistricting decisions at a substantially different scale than in Texas' other statewide plans currently undergoing Section 5 review, which contain far fewer districts. In addition, the House plan was adopted several months earlier than those other statewide redistricting plans.

In terms of the state's demography, one of the most significant changes in the past decade has been the increase in the Hispanic population. From 1980 to 1990, the Hispanic share of the state's population increased from about 21 percent to 26 percent while the black share of the population remained at about 12 percent. For statewide redistricting purposes, significant Hispanic population concentrations are located in south and southwest Texas and in the urban areas of San Antonio (Bexar County), Houston (Harris County), Dallas (Dallas County) and Fort Worth (Tarrant County). There are

significant black population concentrations in Houston, Dallas and Fort Worth.

There are 20 Hispanic and 13 black state representative at this time. Most have been elected from districts in which potential minority voters predominate. Nineteen of the 20 Hispanic representatives serve districts that are over 50 percent Hispanic in voting age population and over 40 percent Hispanic in voter registration. Of the 13 black representatives, eight serve districts that are over 50 percent black in voting age population; the remainder serve districts in which the combined black plus Hispanic voting age populations comprise at least 45 percent of the district. This election history, court findings in voting rights cases, and other information in your submission have led us to examine the 1991 redistricting plan in light of the pattern of racially polarized voting that appears generally to characterize legislative elections in the state.

In addition, your submission notes that both the current and the proposed House plans are drawn (in part) by assigning a whole number of districts to the larger urban counties. Thus, the plans essentially include severable "sub-districting plans" within the overall plan.

With this background in mind, our analysis shows that the proposed Texas House redistricting plan exhibits a pattern of districting decisions that appears to minimize Hispanic voting strength through packing or fragmenting Hispanic population concentrations unnecessarily.

El Paso County, one of the most populous and heavily Hispanic counties in the state, was apportioned five districts. Two of the districts are well over 80 percent Hispanic in voting age population and Hispanics have chosen to be represented by Hispanic legislators. Because of demographic changes in the past decade, it appears that an effective Hispanic registration majority was emerging in the district located between those two districts, which currently has a white incumbent. The plan, however, reduces that district's Hispanic registration by about four percentage points. The state has offered no adequate explanation for this approach as

alternatives were available that would not reduce the Hispanic population in this district.

In south Texas (the area south and southwest of Bexar County, and north of Cameron and Hidalgo Counties), the state chose to draw the district lines generally in an east-west manner. This has the effect of overconcentrating Hispanics in the southernmost districts. At the same time, the two districts (31 and 44) in the northern portion of this area have white voting age population and registration majorities. We understand that it is generally recognized that a north-south configuration would produce an additional district with a significant electoral opportunity for minority voters, and it appears that this option was rejected in large part to protect white incumbent legislators. Similarly, while five districts in Cameron and Hidalgo Counties have substantial Hispanic populations, the Hispanic share of the voting age population and registration in the one district with a white incumbent was reduced. It appears that the asserted interest in keeping the City of Harlingen entirely within this district could have been satisfied without the proposed reduction in the Hispanic share of the population in the district.

In Bexar County, the state decided to increase the number of districts from ten to eleven. While the Hispanic share of the county's population has increased from about 47 percent to almost 50 percent, the plan appears to reduce Hispanic voting strength by packing Hispanics in District 118, which is over 77 percent Hispanic in voting age population, while reducing unnecessarily the Hispanic share of the voting age population in adjoining District 117 (from 54.8% to 50.9%). Particularly given the fact that last decard one of the state's House redistricting plans for Bexar County suffered from the same defect of packing districts with Hispanic population, Terrazas v. Clements, 537 F. Supp. 514, 541-542 (N.D. Tex. 1982), the state has not adequately explained this proposed configuration.

In Dallas County, the decision apparently was made late in the legislative process to reduce from 17 to 16 the number of districts apportioned to the county. The proposed plan includes five districts in which blacks and

Hispanics combined comprise over 60 percent of the voting age population. In four of those districts blacks comprise between 46 and 55 percent of the voting age population and in the fifth district Hispanics comprise 57 percent of the voting age population. The plan appears fairly to reflect black voting strength in the county. For Hispanics, however, we are unable to reach the same conclusion. Our analysis indicates that the plan fragments the growing Hispanic population concentrations in the City of Dallas resulting in a significant reduction in the electoral opportunities for Hispanics in e existing district in that area. This fragmentation does not appear to have been necessary to create other districts in which Hispanics or blacks would have the potential to elect their chose representatives. Indeed, it appears that the legislature was aware that relatively compact districts may be centered on the Hispanic concentrations, thus, more fairly recognizing the fast growing Hispanic population in Dallas County without adversely affecting the four districts with substantial black populations.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained with regard to the redistricting here under review. Therefore, on behalf of the Attorney General, I must object to the 1991 redistricting plan for the State House of Representatives because of the concerns relating to the proposed configurations for the areas discussed above.

Of course, as provided by Section 5, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1991 House redistricting plan has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group and, as you are aware, the State of Texas has filed a lawsuit in which it appears to seek such relief. Texas v. United States, No. 91-2331 (PMWE U.S.C.A., SS, MB) (D.D.C.). In addition, the state may request that the Attorney General reconsider the objection.

Until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1991

redistricting plan for the State House of Representatives continues to be legally unenforceable. Clark v. Roemer, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45. In this regard, you should be aware that the opening of candidate qualifying pursuant to the 1991 plan would constitute a prohibited implementation of this plan. South Carolina v. United States, 585 F. Supp. 418 (D.D.C. 1984); Busbee v. Smith, 549 F. Supp. 494, 497 n.1 (D.D.C. 1982). As we recently informed the court in the pending District of Columbia litigation, we will seek an order enjoining any such illegal implementation of the plan. In addition, in view of that pending litigation, the state may not seek authorization from a state or federal court in Texas or acquiesce in an order from such a court for use of this plan absent preclearance. South Carolina v. United States, 589 F. Supp. 757 (D.D.C. 1984).

We understand that the current schedule calls for candidate qualifying to begin on December 3, 1991, for a primary election on March 10, 1992, and a general election on November 3, 1992. We believe that sufficient time remains for the state to make the necessary adjustments to the submitted plan and to obtain Section 5 preclearance for the plan so that the election may proceed on schedule under a plan that meets the requirements of federal law. Should the state decide to seek to adopt a new plan, our staff remains available to discuss further the nature of our concerns with the submitted plan; if a new plan is adopted and administrative review is sought, we are prepared to respond on an expedited basis.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Steven H. Rosenbaum, Deputy Chief of the Voting Section at (202) 307-3143.

Sincerely,

s/s
John R. Dunne
Assistant Attorney General
Civil Rights Division

FILED
FEB 10 1992
OFFICE OF THE CLERK

NO. 91-1270

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, Governor of Texas, et al.,

Appellants,

v.

LOUIS TERRAZAS, et al.,

Appellees.

APPELLEES' SECOND SUPPLEMENTAL RESPONSE TO APPELLANTS' MOTION FOR EXPEDITED CONSIDERATION OF JURISDICTIONAL STATEMENT

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Appellees Louis Terrazas, Ernest Angelo, Jr., Tom Craddick, Robert A. Estrada, and Sim D. Stokes, III, file this second supplement to their response to the motion for expedited consideration of jurisdictional statement filed by Ann Richards, Dan Morales, and John Hannah, Jr. (collectively, "**the state**").

I.

Preliminary Statement

The purpose of this supplement is to apprise the Court of recent developments in this and other proceedings which relate to the state's request for summary reversal of the orders of the three-judge panel below. The charges made by the state concerning the alleged "judicial corruption" of the panel form the sole

ground for the requested summary reversal. However, the state has overplayed some pieces of evidence and ignored others. Thus, since the state's factual allegations are false, the motion premised upon them should be denied.

II.

Discussion

A. Representative George Pierce Never Had Access to the Court's Interim Senate Plan.

The state continues to argue both before this Court and to the media that State Representative George Pierce ("**Pierce**") had access to and changed the interim redistricting plan issued by the court below on December 24, 1991. The state perpetuates this claim despite the proof in its own records that Pierce actually never ad access to the court's plan.

The Texas legislature maintains a Redistricting Applications Computer, known as the **RED.APPL.** The RED.APPL. is located in the Reagan Building in Austin and is operated by the Texas Legislative Council ("**TLC**"). The TLC is a committee established under Texas law to assist the legislature, and is headed ex officio by the two presiding officers of the legislature, the Speaker of the House and the Lieutenant Governor. Each of these officers appoints four members of his respective house, and together the ten officials run the TLC. The TLC opens one or more RED.APPL. accounts for users of the system -- usually legislators or political groups --

and provides computer technicians to operate the terminals for the account holders. Until released into the public sector, the contents of a user's RED.APPL. account are proprietary, and any redistricting plan is prefixed by the account name and designated by the number assigned by the user. Once a plan is released to the public, the TLC assigns it a new number, prefixed by the initial of the legislative body it redistricts: thus, the secret plan agreed to by the state in October 1991 was designated **S560**, and the plan offered by Appellees in their December trial was designated **S562**.

According to records produced by the state last week when it filed its most recent motion to recuse one of the panel members ("**Second Recusal Motion**"), two accounts were opened for the use of the three-judge panel's law clerks. These were designated **NOWL** and **NOW2**. The state attached portions of the computer records related to these accounts to the Second Recusal Motion. Copies of pertinent portions of these records are compiled in **Appendix 1** hereto. These records demonstrate that Representative Pierce did not work on the plan that became the court-ordered plan. According to the records produced by the state, the facts appear to be as follows:

1. On December 23, 1991, J.D. Munn ("**Munn**"), Judge Nowlin's law clerk, worked on plan **NOW2S501** in account NOW2. He made changes in that plan and saved it as **NOW2S503**.

2. Pierce was allowed to view a screen showing a portion of Bexar County; this was part of plan NOW2S503 and was in account NOW2.

3. Changes were made in plan NOW2S503; the changes were in the lines for districts 19 and 26 in Bexar County. Some 35 of Texas' 7,000 Voter Tabulation Districts were involved. This occurred between 12:03 and 12:26 on December 23. Pierce left, and the TLC operator and Munn remained. Deposition of George Pierce, 2/3/92 ("**Pierce Tr.**") at 69. [Attached to Appellees' response to the state's instant motion, dated February 11, 1992]. According to the state's records, Munn did not request any population analysis reports, maps, or other output on December 23, 1991. See Appendix 1.

4. Munn and Pierce did not work in account NOWL. In fact, the exhibits attached to the Second Recusal Motion indicate that Munn did no work in account NOWL between December 18 and December 24. See Appendix 1. Law clerks Britt Buchanan ("**Buchanan**") and Michelle Bray ("**Bray**") used that account, but there are no entries showing that Munn used it.

5. The court-ordered plan is designated **S567**. That plan was drafted in the NOWL account under the designation **NOWLS508**. On December 22, 1991, Bray worked on the plan

and designated it a public plan S565. The next day, several hours after Pierce left the REDAPPL, Buchanan worked on plan S508 in the NOWL account. This occurred between 5:52 and 6:25 p.m. on December 23.

6. Buchanan made changes to the Bexar County area in plan S508. These changes were not identical to those made by Pierce in his work with Munn on plan S503 in the NOW2 account. Buchanan made changes that Pierce did not make in plan S503. He also did not make changes in plan S508 that Pierce made in plan S503.

7. The state does not allege that Pierce was present with Buchanan and the operator on December 23. Since it seems to have no trouble obtaining affidavits from TLC employees, they no doubt would make such an allegation if there was a basis to do so.

These records -- not produced by the state to this Court, and only produced to the court below three weeks after the first public allegations -- belie the public charges in the press and the pleadings that Pierce drew lines in the court-ordered plan are false. These charges rely on artful manipulation of the facts and careful crafting of allegations to lead to a false conclusion. The facts prove that Pierce did not see, let alone alter, the plan that became the court-ordered plan. There is no evidence that anything he did was transferred into the court-ordered plan.

B. **Changes Made on December 23 Improved Minority Voting Rights in Bexar County.**

The state's records prove that Pierce did not touch the court-ordered plan himself. Now that the meaning of the state's records has been deciphered -- with no help from the state -- the state recently has backed off of its claim that Pierce changed the plans, and now hints in the press that his changes in the NOW2 account somehow tainted the court's plan in the NOWL account.

However, for all of attention on the form of the court's December 23d changes, the state never addresses the substance of the differences between the NOWL plan in the morning, as S565, and as released the following day, as S567. The state does not argue -- much less offer proof -- that the lower court's senate plan does not provide greater protection to minority voters than its incumbent-protecting predecessors. Neither does the state contend that the lower court's plan violates section 2 of the Voting Rights Act.

The truth is that the changes made by the court after Pierce made his corrections to another plan in another account actually increased minority population concentrations in the affected minority district, District 19 in Bexar County. Before the public release of S567, the court's plan in the account NOW1 (S565) drew Senate District 19 (in the center of San Antonio in Bexar County) with a total Hispanic population of 60.8% and an Hispanic voting

age population ("**VAP**") of 55.8%. After the final changes were made, S567 drew District 19 with a total Hispanic population of 61.1% and an Hispanic VAP of 56.3%. This represents an increase of 1,890 Hispanic citizens and 1,644 Hispanic voters in the minority majority district. Conversely, the Hispanic population of Senate District 26 -- the adjacent district and the one whose lines the state's alleges Pierce changed -- fell by 1,656 Hispanic citizens and 1,491 Hispanic voters between S565 and S567. Throughout the lower court's planning process, District 26 always had been a majority Anglo district: under S565 Anglos represented 76.8% of its VAP, and under S567 they represent 77%. Copies of the population analysis reports, which were prepared by the state's computer, verify these figures, and are attached as **Appendix 2**. This evidence, as contradistinguished from the state's conjectures, shows that the final court plan improved minority voting strength in District 19 by moving minority communities out of the Anglo-majority District 26. It is this change -- the substance of which the state ignores or avoids -- that the state says requires the entire plan to fall.

C. Representative Alan Schoolcraft Never Contacted the Court Below.

The state's newest "revelation" -- found in telephone logs it has had for over six weeks -- is that State Representative Alan Schoolcraft ("**Schoolcraft**"), another San Antonio Republican, somehow fixed his putative senate district after a two-minute

phone call to Judge Nowlin's chambers on December 23. According to the state's motion for oral argument (mooted by the denial of its most recent emergency motion for stay of the senate primary), the existence in the state's phone log of a two-minute call placed from one telephone to another supports reversal of the court's opinion below. There are, however, at least three serious problems with this argument.

The first difficulty is technical, since the state's phone logs reflect only that a call was made, and not that a call was answered. Thus, the reputed Schoolcraft "connection" could be a busy signal, a disconnect, an answering machine, or an unanswered series of rings. Moreover, since this system rounds up to the nearest minute, the whole episode could comprise a ninety-second missed connection.

The second problem is logical, since the state's theory up to now has rested on the fact that Pierce "fixed" his future senate district at the court's behest, or at least with its knowledge. The idea that the same was done for Schoolcraft -- who also is running for Senate District 26 -- creates mutually exclusive conspiracy theories. In this race, the state should back only one stalking horse at a time.

Both of these obstacles, however, are minor in comparison to the third problem: the state is factually wrong. As shown by Schoolcraft's affidavit, attached hereto as **Appendix 3**, the court

never heard from the representative or anyone else acting on his behalf. The telephone from which the call was made is not in his office, and the call was made when he was out of town. Schoolcraft's affidavit demonstrate's the desperate and slipshod manner in which the state is acting: had it bothered to contact him before making serious charges in the highest court in the country, it would have learned that it was about to sully the reputation of yet another public official without cause.

D. The State's New Senate Plan Has Not Been Precleared.

The final point concerns the state's unsupported allegation that the legislative senate plan passed in January 1992 has received Justice Department preclearance. The fallacies in that argument were addressed very ably by the Justice Department in a brief submitted last week before the three-judge court in the District of Columbia presiding over the state's judicial preclearance action. A copy of that brief is attached hereto as **Appendix 4.**

IV.

Conclusion

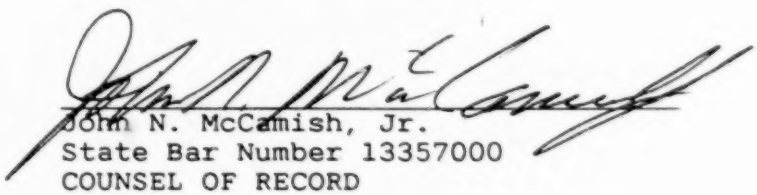
Texas has a senate plan, one that is more protective of minority voting rights than the deal struck by the incumbents in the legislature. Today, Texans began the early balloting process that precedes the March 10 "Super Tuesday" election. Ballots have been prepared that contain the names of the candidates who filed

for office under the court's interim plan. Whatever the problems the state sees or worsens through publicity have nothing to do with the names on those ballots or the people who will vote for them. The fact that the Judicial Conference for the Fifth Circuit has decided to initiate an investigation is a matter for reasoned deliberation and due process. Its conclusions, which Appellees believe will exonerate the lower court from the self-promoting charges of the state's elected officials, are not to be begged or mooted by precipitate action taken in response to questionable rumors and cynical suspicion.

For these reasons -- and because the state's suspicions appear disproved by its records -- Appellees continue to urge this Court to deny the motion for expedited consideration of Appellants' jurisdictional statement, or, in the alternative, to grant summary affirmance or dismissal of the state's appeal.

February 19, 1992

Respectfully submitted,



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McCAMISH, MARTIN &
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Activity in Court Computer Accounts

Account Number	Date	Operator	Beginning Time	Ending Time	Plan #	Activity	Planner
NOW2	12/18/91				NOW2S500	created S500 from Mena Plan (S560)	Buchanan
NOW2	12/18/91	TMH	9:07 PM	9:40 PM	NOW2S501	created S501 from Fair Redistricting (S562)	Buchanan
NOWL	12/19/91	SLD	10:53 AM	12:05 PM	NOWLS500	created S500 from SB31 (S552)	Buchanan or Bray
NOWL	12/19/91	SJK	1:26 PM	3:54 PM	NOWLS500	modified S500	Bray, Carl
NOW2	12/19/91	TMH	3:13 PM	4:49 PM	NOW2S501	modified S501	Buchanan, Randall
NOWL	12/19/91	SJK	3:57 PM	4:08 PM	NOWLS500	modeling started, S500 recalculated	Bray, Carl
NOWL	12/19/91	SJK	4:09 PM	4:32 PM	NOWLS500	modified S500	Bray, Carl
NOWL	12/19/91	SJK	4:44 PM	5:55 PM	NOWLS500	modified S500	Bray
NOW2	12/19/91	TMH	4:50 PM	4:50 PM	NOW2S501	changed plan description	Buchanan, Randall
NOWL	12/19/91	SJK	6:00 PM	6:00 PM	NOWLS502	created S502 as new computer plan	Bray
NOWL	12/19/91	SJK	6:00 PM	6:46 PM	NOWLS502	modified S502	Bray
NOWL	12/19/91	CWK	8:20 PM	9:33 PM	NOWLS502	modified S502	Bray
NOWL	12/19/91	CWK	9:36 PM	9:36 PM	NOWLS501	copied by district from SB31 (S552)	Bray
NOWL	12/19/91	CWK	9:40 PM	9:40 PM	NOWLS502	NOWLS503 merged into S502	Bray
NOWL	12/19/91	CWK	9:40 PM	9:40 PM	NOWLS503	created S503 from SB31 (S552)	Bray
NOWL	12/19/91	CWK	9:40 PM	9:40 PM	NOWLS503	S503 merged into NOWLS502	Bray
NOWL	12/19/91	CWK	9:43 PM	11:46 PM	NOWLS502	modeling started, S502 recalculated	Bray
NOWL	12/19/91	CWK	11:47 PM	12:01 AM	NOWLS502	modified S502	Bray
NOWL	12/20/91	SRH	1:28 PM	3:14 PM	NOWLS502	modeling started, S502 recalculated	Bray
NOWL	12/20/91	SRH	3:16 PM	4:11 PM	NOWLS502	modified S502	Bray
NOW2	12/20/91	TMH	3:24 PM	4:15 PM	NOW2S501	modified S501	Buchanan, Munn
NOWL	12/20/91	SRH	4:13 PM	4:53 PM	NOWLS502	modified S502	Bray
NOW2	12/20/91	TMH	4:18 PM	4:18 PM	NOW2S502	created S502	Buchanan, Munn
NOW2	12/20/91	TMH	4:21 PM	4:21 PM	NOW2S501	replaced county 023 from NOW2S502	Buchanan, Munn
NOW2	12/20/91	TMH	4:24 PM	4:24 PM	NOW2S501	S501 recalculated	Buchanan, Munn
NOW2	12/20/91	TMH	4:25 PM	4:50 PM	NOW2S501	modified S501	Buchanan, Munn
NOWL	12/20/91	SRH	5:05 PM	5:12 PM	NOWLS504	created S504 from Fair Redistricting (S562)	Bray
NOWL	12/20/91	SRH	5:19 PM	5:19 PM	NOWLS504	NOWLS505 merged into S504	Bray
NOWL	12/20/91	SRH	5:19 PM	5:19 PM	NOWLS505	created S505 from SB31 (S552)	Bray
NOWL	12/20/91	SRH	5:19 PM	5:19 PM	NOWLS505	S505 merged into NOWLS504	Bray
NOWL	12/20/91	SRH	5:20 PM	7:22 PM	NOWLS504	modified S504	Bray
NOWL	12/20/91	SRH	8:45 PM	9:25 PM	NOWLS504	modified S504	Bray
NOWL	12/20/91	SRH	9:36 PM	10:21 PM	NOWLS504	modified S504	Bray

APPENDIX 1

Activity in Court Computer Accounts

Account Number	Date	Operator	Beginning Time	Ending Time	Plan #	Activity	Planner
NOWL	12/20/91	SRH	10:27 PM	10:49 PM	NOWLS504	modified S504	Bray
NOWL	12/20/91	SRH	10:51 PM	11:12 PM	NOWLS502	modified S502	Bray
NOWL	12/20/91	SRH	11:17 PM	11:30 PM	NOWLS506	created S506 from Fair Redistricting (S562)	Bray
NOWL	12/20/91	SRH	11:33 PM	11:48 PM	NOWLS506	modified S506	Bray
NOWL	12/20/91	SRH	11:52 PM	11:52 PM	NOWLS505	NOWLS507 merged into S505	Bray
NOWL	12/20/91	SRH	11:52 PM	11:52 PM	NOWLS507	created S507 from SB31 (S552)	Bray
NOWL	12/20/91	SRH	11:52 PM	11:52 PM	NOWLS507	S507 merged into NOWLS505	Bray
NOWL	12/20/91	SRH	11:56 PM	11:56 PM	NOWLS506	NOWLS507 merged into S506	Bray
NOWL	12/20/91	SRH	11:56 PM	11:56 PM	NOWLS507	S507 merged into NOWLS506	Bray
NOWL	12/20/91	SRH	11:57 PM	11:59 PM	NOWLS506	modified S506, session continued till 12/21/91	Bray
NOWL	12/21/91	SRH	12:00 AM	12:12 AM	NOWLS506	modified S506, session began on 12/20/91	Bray
NOWL	12/21/91	BDM	10:11 AM	1:08 PM	NOWLS506	modified S506	Bray
NOWL	12/21/91	RKB	2:21 PM	3:00 PM	NOWLS508	created S508 from Fair Redistricting (S562)	Bray
NOWL	12/21/91	RKB	3:10 PM	3:10 PM	NOWLS508	NOWLS509 merged into S508	Bray
NOWL	12/21/91	RKB	3:10 PM	3:10 PM	NOWLS509	created S509 from SB31 (S552)	Bray
NOWL	12/21/91	RKB	3:10 PM	3:10 PM	NOWLS509	S509 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	3:11 PM	4:18 PM	NOWLS508	modified S508	Bray
NOWL	12/21/91	RKB	4:23 PM	4:23 PM	NOWLS504	S504 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	4:23 PM	4:23 PM	NOWLS508	NOWLS504 merged into S508	Bray
NOWL	12/21/91	RKB	4:28 PM	4:28 PM	NOWLS502	S502 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	4:28 PM	4:28 PM	NOWLS508	NOWLS502 merged into S508	Bray
NOWL	12/21/91	RKB	4:39 PM	4:39 PM	NOWLS508	NOWLS510 merged into S508	Bray
NOWL	12/21/91	RKB	4:39 PM	4:39 PM	NOWLS510	created S510 from SB31 (S552)	Bray
NOWL	12/21/91	RKB	4:39 PM	4:39 PM	NOWLS510	S510 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	4:40 PM	5:04 PM	NOWLS508	modeling started, S508 recalculated	Bray
NOWL	12/21/91	RKB	5:04 PM	5:15 PM	NOWLS508	modified S508	Bray
NOWL	12/21/91	RKB	5:20 PM	5:20 PM	NOWLS508	replaced county 339 from NOWLS501	Bray
NOWL	12/21/91	RKB	5:22 PM	5:22 PM	NOWLS508	S508 recalculated	Bray
NOWL	12/21/91	RKB	5:23 PM	6:25 PM	NOWLS508	modified S508	Bray
NOWL	12/22/91	SDS	10:07 AM	11:29 AM	NOWLS508	modified S508	Bray
NOW2	12/23/91	BDM	11:39 AM	11:51 AM	NOW2S501	modified S501	Munn
NOW2	12/23/91	BDM	11:51 AM	11:55 AM	NOW2S501	NOW2S501 saved to NOW2S503	Munn
NOW2	12/23/91	BDM	11:56 AM	11:56 AM	NOW2S501	saved S501	Munn

Plan : S501
Date Created : 12/18/91

Audit File

CF	91-10-23	2:43 PM	plans562	--------	redrvh	plan	Copy from another client
MI	91-12-18	9:07 PM	now2s501	--------	redtmh	now2	Modeling started
MO	91-12-18	9:40 PM	now2s501	--------	redtmh	now2	No changes saved
MO	91-12-18	9:40 PM	now2s501	--------	redtmh	now2	Exited Modeling
MI	91-12-19	3:13 PM	now2s501	--------	redtmh	now2	Modeling started
MS	91-12-19	4:48 PM	now2s501	--------	redtmh	now2	Plan Modeling Save
MO	91-12-19	4:48 PM	now2s501	--------	redtmh	now2	Changes saved
MO	91-12-19	4:49 PM	now2s501	--------	redtmh	now2	Exited Modeling
ED	91-12-19	4:50 PM	now2s501	--------	redtmh	now2	Description modified
MI	91-12-20	3:24 PM	now2s501	--------	redtmh	now2	Modeling started
M	91-12-20	4:14 PM	now2s501	--------	redtmh	now2	Plan Modeling Save
MO	91-12-20	4:14 PM	now2s501	--------	redtmh	now2	Changes saved
MO	91-12-20	4:15 PM	now2s501	--------	redtmh	now2	Exited Modeling
RP	91-12-20	4:21 PM	now2s501	now2s502	redtmh	now2	Replaced cnty:023
RC	91-12-20	4:24 PM	now2s501	now2s502	redtmh	now2	Plan Recalculated
MI	91-12-20	4:25 PM	now2s501	now2s502	redtmh	now2	Modeling started
MS	91-12-20	4:49 PM	now2s501	now2s502	redtmh	now2	Plan Modeling Save
MO	91-12-20	4:49 PM	now2s501	now2s502	redtmh	now2	Changes saved
MO	91-12-20	4:50 PM	now2s501	now2s502	redtmh	now2	Exited Modeling
MI	91-12-23	11:39 AM	now2s501	--------	redbdm	now2	Modeling started
MS	91-12-23	11:50 AM	now2s501	--------	redbdm	now2	Plan Modeling Save
MO	91-12-23	11:50 AM	now2s501	--------	redbdm	now2	Changes saved
MO	91-12-23	11:51 AM	now2s501	--------	redbdm	now2	Exited Modeling
MI	91-12-23	11:51 AM	now2s501	--------	redbdm	now2	Modeling started

BEST AVAILABLE COPY

Activity in Court Computer Accounts

Account Number	Date	Operator	Beginning Time	Ending Time	Plan #	Activity	Planner
NOW2	12/23/91	BDM	11:58 AM	11:58 AM	NOW2S503	S503 created from NOW2S501, description modified	Munn
NOW2	12/23/91	BDM	11:58 AM	12:02 PM	NOW2S503	modified S503	Munn
NOW2	12/23/91	BDM	12:03 PM	12:24 PM	NOW2S503	modified S503	Munn
NOW2	12/23/91	BDM	12:26 PM	12:26 PM	NOW2S503	description of S503 modified	Munn
NOWL	12/23/91	RVH	5:52 PM	6:25 PM	NOWLS508	modified S508	Buchanan

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MC 91-12-23 11:55 AM now2s501 -------- redbdm now2    now2s501 saved to now2s50
MO 91-12-23 11:56 AM now2s501 -------- redbdm now2                Changes save
   91-12-23 11:56 AM now2s501 -------- redbdm now2                Exited Modelin
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ED 91-12-23 11:58 AM now2s503 -------- redbdm now2          Description modifie
   91-12-23 11:58 AM now2s503 -------- redbdm now2          Modeling starte
MO 91-12-23 12:02 PM now2s503 -------- redbdm now2          Changes save
MO 91-12-23 12:02 PM now2s503 -------- redbdm now2          Exited Modelin
MI 91-12-23 12:03 PM now2s503 -------- redbdm now2          Modeling starte
MS 91-12-23 12:24 PM now2s503 -------- redbdm now2          Plan Modeling Sav
MO 91-12-23 12:24 PM now2s503 -------- redbdm now2          Changes save
MO 91-12-23 12:24 PM now2s503 -------- redbdm now2          Exited Modelin
ED 91-12-23 12:26 PM now2s503 -------- redbdm now2          Description modifie
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BEST AVAILABLE COPY

MO	91-12-21	6:25	PM	no 508	nowls501	redrkb	nowl	Exited Modelin
MI	91-12-22	10:07	AM	nowls508	--------	redsds	nowl	Modeling started
MS	91-12-22	11:29	AM	nowls508	--------	redsds	nowl	Plan Modeling Save
	91-12-22	11:29	AM	nowls508	--------	redsds	nowl	Changes saved
MO	91-12-22	11:29	AM	nowls508	--------	redsds	nowl	Exited Modeling
MI	91-12-23	5:52	PM	nowls508	--------	redrvh	nowl	Modeling started
MS	91-12-23	6:24	PM	nowls508	--------	redrvh	nowl	Plan Modeling Save
MO	91-12-23	6:24	PM	nowls508	--------	redrvh	nowl	Changes saved
MO	91-12-23	6:25	PM	nowls508	--------	redrvh	nowl	Exited Modeling

PAR:20 4B
DATA: 1990 CENSUS DATA - UNADJUSTED
PLANID: PLANS565 122391 16:01:20

PLAN POPULATION ANALYSIS
SENATE DISTRICTS

TOTAL STATE POPULATION 16,986,510
TOTAL DISTRICTS REQUIRED 31
IDEAL DISTRICT POPULATION 547,952

	MEAN (AVERAGE)	SMALLEST POPULATION DIST: 25	LARGEST POPULATION DIST: 22
DISTRICT POPULATION	547,952	520,631	575,314
TOTAL DEVIATION	15,466	-27,321	27,362
PERCENT DEVIATION	2.82%	-4.99%	4.99%

UNASSIGNED POPULATION 0
REMAINING DISTRICTS 0
UNASSIGNED MEAN DEVIATION

PLAN'S RANGE OF DEVIATION: TOTAL = 54,683 PERCENT = 9.98%

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DIST	DEVIATION TOTAL	DEVIATION PERCENT		POPULATION TOTAL	BLACK	HISPANIC	BLK+HISP	ANGLO	OTHER	% OF POPULATION BLACK	HISP	B+H	ANGLO	OTHER
18	13,556	2.47	TTL	561,508	54,167	146,518	198,858	352,558	10,092	9.6	26.1	35.4	62.8	1.8
			VAP	400,161	37,119	91,673	127,692	265,984	6,485	9.3	22.9	31.9	66.5	1.6
19	0	0.00	TTL	547,952	25,522	332,941	357,041	183,544	7,367	4.7	60.8	65.2	33.5	1.3
			VAP	394,968	18,114	220,332	237,626	151,737	5,605	4.6	55.8	60.2	38.4	1.4
20	-25,868	-4.72	TTL	522,084	14,815	335,427	349,232	168,092	4,760	2.8	64.2	66.9	32.2	0.9
			VAP	348,370	9,955	208,007	217,401	127,619	3,350	2.9	59.7	62.4	36.6	1.0
21	15,357	2.80	TTL	563,309	15,190	358,205	372,625	183,020	7,664	2.7	63.6	66.1	32.5	1.4
			VAP	377,732	10,378	224,420	234,383	137,808	5,541	2.7	59.4	62.1	36.5	1.5
22	27,362	4.99	TTL	575,314	13,512	40,739	53,958	510,112	11,244	2.3	7.1	9.4	88.7	2.0
			VAP	413,208	9,078	24,964	33,889	371,848	7,471	2.2	6.0	8.2	90.0	1.8
23	-810	-0.15	TTL	547,142	263,114	118,775	377,123	159,480	10,539	48.1	21.7	68.9	29.1	1.9
			VAP	385,769	177,311	74,079	248,434	130,089	7,246	46.0	19.2	64.4	33.7	1.9
24	-5,746	-1.05	TTL	542,206	49,701	305,539	353,592	182,461	6,153	9.2	56.4	65.2	33.7	1.1
			VAP	364,942	34,168	190,337	223,600	136,984	4,358	9.4	52.2	61.3	37.5	1.2
25	-27,321	-4.99	TTL	520,631	29,857	91,167	120,146	393,889	6,596	5.7	17.5	23.1	75.7	1.3
			VAP	383,752	20,767	56,357	76,689	302,372	4,691	5.4	14.7	20.0	78.8	1.2
26	25,629	4.68	TTL	573,581	45,645	91,809	135,876	425,950	11,755	8.0	16.0	23.7	74.3	2.0
			VAP	414,616	29,923	58,739	87,800	318,348	8,468	7.2	14.2	21.2	76.8	2.0
27	0	0.00	TTL	547,952	1,571	446,813	447,934	97,271	2,747	0.3	81.5	81.7	17.8	0.5
			VAP	355,717	1,006	273,302	274,078	79,712	1,927	0.3	76.8	77.0	22.4	0.5
28	-24,389	-4.45	TTL	523,563	30,891	160,344	190,248	327,275	6,040	5.9	30.6	36.3	62.5	1.2
			VAP	369,493	19,980	94,012	113,508	251,581	4,404	5.4	25.4	30.7	68.1	1.2
29	-15,357	-2.80	TTL	532,595	17,185	375,146	390,922	134,349	7,324	3.2	70.4	73.4	25.2	1.4
			VAP	360,677	11,661	240,035	251,035	104,230	5,412	3.2	66.6	69.6	28.9	1.5
30	-23,163	-4.23	TTL	524,789	32,203	44,015	75,676	441,042	8,071	6.1	8.4	14.4	84.0	1.5
			VAP	390,353	21,797	26,535	48,020	336,550	5,783	5.6	6.8	12.3	86.2	1.5
31	-23,450	-4.28	TTL	524,502	22,049	103,478	124,855	391,348	8,299	4.2	19.7	23.8	74.6	1.6
			VAP	365,147	14,025	58,922	72,619	286,951	5,577	3.8	16.1	19.9	78.6	1.5
PLAN TOTALS			TTL	16,986,510	2,021,632	4,339,905	6,316,265	10,291,680	378,565	11.9	25.5	37.2	60.6	2.2
			VAP	12,150,671	1,363,770	2,719,586	4,056,274	7,828,352	266,045	11.2	22.4	33.4	64.4	2.2

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DIST	DEVIATION TOTAL	DEVIATION PERCENT		POPULATION TOTAL	BLACK	HISPANIC	BLK+HISP	ANGLO	OTHER	% OF POPULATION BLACK	HISP	B+H	ANGLO	OTHER
1	-19,879	-3.63	TTL	528,073	101,166	15,636	116,266	408,026	3,781	19.2	3.0	22.0	77.3	0.7
			VAP	384,173	67,018	9,563	76,260	305,264	2,649	17.4	2.5	19.9	79.5	0.7
2	26,196	4.78	TTL	574,148	56,428	36,216	92,023	471,277	10,848	9.8	6.3	16.0	82.1	1.9
			VAP	413,942	38,038	22,315	59,988	346,664	7,290	9.2	5.4	14.5	83.7	1.8
3	10,975	2.00	TTL	558,927	70,483	24,700	94,609	460,270	4,048	12.6	4.4	16.9	82.3	0.7
			VAP	412,356	46,439	14,957	61,045	348,435	2,876	11.3	3.6	14.8	84.5	0.7
4	-2,911	-0.53	TTL	545,041	95,369	28,480	123,009	413,162	8,870	17.5	5.2	22.6	75.8	1.6
			VAP	388,272	63,231	17,813	80,545	302,115	5,612	16.3	4.6	20.7	77.8	1.4
5	-14,435	-2.63	TTL	533,517	96,430	62,155	157,195	369,090	7,232	18.1	11.7	29.5	69.2	1.4
			VAP	401,583	69,202	40,677	108,965	286,900	5,718	17.2	10.1	27.1	71.4	1.4
6	6,740	1.23	TTL	554,692	83,415	97,722	178,906	354,263	21,523	15.0	17.6	32.3	63.9	3.9
			VAP	388,435	52,636	60,541	111,869	262,154	14,412	13.6	15.6	28.8	67.5	3.7
7	23,216	4.24	TTL	571,168	26,633	60,513	86,385	459,404	25,379	4.7	10.6	15.1	80.4	4.4
			VAP	408,310	16,696	38,755	54,988	336,237	17,085	4.1	9.5	13.5	82.3	4.2
8	26,069	4.76	TTL	574,021	27,443	50,409	77,191	474,449	22,381	4.8	8.8	13.4	82.7	3.9
			VAP	443,855	19,673	34,520	53,767	374,217	15,871	4.4	7.8	12.1	84.3	3.6
9	-9,750	-1.78	TTL	538,202	64,378	57,239	120,670	410,150	7,382	12.0	10.6	22.4	76.2	1.4
			VAP	384,345	41,393	34,495	75,333	303,836	5,176	10.8	9.0	19.6	79.1	1.3
10	-17,694	-3.23	TTL	530,258	26,702	36,521	62,722	452,015	15,521	5.0	6.9	11.8	85.2	2.9
			VAP	387,950	17,166	23,261	40,137	337,074	10,739	4.4	6.0	10.3	86.9	2.8
11	-1,869	-0.34	TTL	546,083	58,445	84,943	141,936	389,754	14,393	10.7	15.6	26.0	71.4	2.6
			VAP	392,287	39,748	53,615	92,416	289,963	9,908	10.1	13.7	23.6	73.9	2.5
12	-1,661	-0.30	TTL	546,291	123,266	174,829	295,408	236,585	14,298	22.6	32.0	54.1	43.3	2.6
			VAP	384,694	81,723	106,351	186,494	188,287	9,913	21.2	27.6	48.5	48.9	2.6
13	-6,047	-1.10	TTL	541,905	316,629	91,112	402,545	126,169	13,191	58.4	16.8	74.3	23.3	2.4
			VAP	381,996	218,502	56,868	271,967	100,601	9,428	57.2	14.9	71.2	26.3	2.5
14	20,984	3.83	TTL	568,936	63,416	124,704	185,916	364,938	18,082	11.1	21.9	32.7	64.1	3.2
			VAP	430,890	43,442	82,412	124,542	291,987	14,361	10.1	19.1	28.9	67.8	3.3
15	-19,368	-3.53	TTL	528,584	84,879	301,982	383,392	133,749	11,443	16.1	57.1	72.5	25.3	2.2
			VAP	361,135	57,346	186,162	241,340	111,584	8,211	15.9	51.5	66.8	30.9	2.3
16	24,928	4.55	TTL	572,880	52,218	53,553	104,778	443,093	25,009	9.1	9.3	18.3	77.3	4.4
			VAP	433,989	35,653	35,700	70,707	345,817	17,465	8.2	8.2	16.3	79.7	4.0
17	18,704	3.41	TTL	566,656	58,910	88,275	145,228	374,895	46,533	10.4	15.6	25.6	66.2	8.2
			VAP	427,554	40,582	59,867	99,137	295,404	33,013	9.5	14.0	23.2	69.1	7.7

DIST	DEVIATION TOTAL	DEVIATION PERCENT		POPULATION TOTAL	POPULATION BLACK	POPULATION HISPANIC	POPULATION BLK+HISP	POPULATION ANGLO	POPULATION OTHER	% OF POPULATION BLACK	% OF POPULATION HISP	% OF POPULATION B+H	% OF POPULATION ANGLO	% OF POPULATION OTHER
1	-19,879	-3.63	TTL	528,073	101,166	15,636	116,266	408,026	3,781	19.2	3.0	22.0	77.3	0.7
			VAP	384,173	67,018	9,563	76,260	305,264	2,649	17.4	2.5	19.9	79.5	0.7
2	26,196	4.78	TTL	574,148	56,428	36,216	92,023	471,277	10,848	9.8	6.3	16.0	82.1	1.9
			VAP	413,942	38,038	22,315	59,988	346,664	7,290	9.2	5.4	14.5	83.7	1.8
3	10,975	2.00	TTL	558,927	70,483	24,700	94,609	460,270	4,048	12.6	4.4	16.9	82.3	0.7
			VAP	412,356	46,439	14,957	61,045	348,435	2,876	11.3	3.6	14.8	84.5	0.7
4	-2,911	-0.53	TTL	545,041	95,369	28,480	123,009	413,162	8,870	17.5	5.2	22.6	75.8	1.6
			VAP	388,272	63,231	17,813	80,545	302,115	5,612	16.3	4.6	20.7	77.8	1.4
5	-10,794	-1.97	TTL	537,158	96,446	62,272	157,328	372,571	7,259	18.0	11.6	29.3	69.4	1.4
			VAP	404,081	69,214	40,748	109,048	289,302	5,731	17.1	10.1	27.0	71.6	1.4
6	6,740	1.23	TTL	554,692	83,415	97,722	178,906	354,263	21,523	15.0	17.6	32.3	63.9	3.9
			VAP	388,435	52,636	60,541	111,869	262,154	14,412	13.6	15.6	28.8	67.5	3.7
7	23,216	4.24	TTL	571,168	26,633	60,513	86,385	459,404	25,379	4.7	10.6	15.1	80.4	4.4
			VAP	408,310	16,696	38,755	54,988	336,237	17,085	4.1	9.5	13.5	82.3	4.2
8	26,069	4.76	TTL	574,021	27,443	50,409	77,191	474,449	22,381	4.8	8.8	13.4	82.7	3.9
			VAP	443,855	19,673	34,520	53,767	374,217	15,871	4.4	7.8	12.1	84.3	3.6
9	-9,750	-1.78	TTL	538,202	64,378	57,239	120,670	410,150	7,382	12.0	10.6	22.4	76.2	1.4
			VAP	384,345	41,393	34,495	75,333	303,836	5,176	10.8	9.0	19.6	79.1	1.3
10	-17,694	-3.23	TTL	530,258	26,702	36,521	62,722	452,015	15,521	5.0	6.9	11.8	85.2	2.9
			VAP	387,950	17,166	23,261	40,137	337,074	10,739	4.4	6.0	10.3	86.9	2.8
11	-1,869	-0.34	TTL	546,083	58,445	84,943	141,936	389,754	14,393	10.7	15.6	26.0	71.4	2.6
			VAP	392,287	39,748	53,615	92,416	289,963	9,908	10.1	13.7	23.6	73.9	2.5
12	-1,661	-0.30	TTL	546,291	123,266	174,829	295,408	236,585	14,298	22.6	32.0	54.1	43.3	2.6
			VAP	384,694	81,723	106,351	186,494	188,287	9,913	21.2	27.6	48.5	48.9	2.6
13	-6,047	-1.10	TTL	541,905	316,629	91,112	402,545	126,169	13,191	58.4	16.8	74.3	23.3	2.4
			VAP	381,996	218,502	56,868	271,967	100,601	9,428	57.2	14.9	71.2	26.3	2.5
14	20,984	3.83	TTL	568,936	63,416	124,704	185,916	364,938	18,082	11.1	21.9	32.7	64.1	3.2
			VAP	430,890	43,442	82,412	124,542	291,987	14,361	10.1	19.1	28.9	67.8	3.3
15	-19,368	-3.53	TTL	528,584	84,879	301,982	383,392	133,749	11,443	16.1	57.1	72.5	25.3	2.2
			VAP	361,135	57,346	186,162	241,340	111,584	8,211	15.9	51.5	66.8	30.9	2.3
16	24,928	4.55	TTL	572,880	52,218	53,553	104,778	443,093	25,009	9.1	9.3	18.3	77.3	4.4
			VAP	433,989	35,653	35,700	70,707	345,817	17,465	8.2	8.2	16.3	79.7	4.0
17	18,704	3.41	TTL	566,656	58,910	88,275	145,228	374,895	46,533	10.4	15.6	25.6	66.2	8.2
			VAP	427,554	40,582	59,867	99,137	295,404	33,013	9.5	14.0	23.2	69.1	7.7

BEST AVAILABLE COPY

TOTAL STATE POPULATION 16,986,510
TOTAL DISTRICTS REQUIRED 31
IDEAL DISTRICT POPULATION 547,952

UNASSIGNED POPULATION 0
REMAINING DISTRICTS 0
UNASSIGNED MEAN DEVIATION .

	MEAN (AVERAGE)	SMALLEST POPULATION DIST.: 25	LARGEST POPULATION DIST.: 22
DISTRICT POPULATION	547,952	520,631	575,314
TOTAL DEVIATION	14,458	-27,321	27,362
PERCENT DEVIATION	2.64%	-4.99%	4.99%

PLAN'S RANGE OF DEVIATION: TOTAL = 54,683 PERCENT = 9.98%

NO. 91-1270

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, Governor of Texas, et al.,

Appellants,

v.

LOUIS TERRAZAS, et al.,

Appellees.

AFFIDAVIT OF ALAN SCHOOLCRAFT

STATE OF TEXAS §
§ ss.:
COUNTY OF BEXAR §

BEFORE ME, the undersigned Notary Public, personally appeared ALAN SCHOOLCRAFT, known to me to be the person whose signature is subscribed below, who, being by me duly sworn, on his oath deposed and stated as follows:

1. My name is Alan Schoolcraft. I am over the age of 21 years and fully competent and qualified to make this affidavit. I have personal knowledge of all of the facts stated in this affidavit and they are true and correct.

2. I am member of the House of Representatives of the State of Texas, representing House District 121. I have been a member of the House of Representatives since 1981.

PAN2000
DATA: 1990 CENSUS DATA - UNADJUSTED
PLANID: PLANS567 122391 18:43:34

DIST	DEVIATION TOTAL	DEVIATION PERCENT		POPULATION TOTAL	POPULATION BLACK	POPULATION HISPANIC	POPULATION BLK+HISP	POPULATION ANGLO	POPULATION OTHER
18	13,556	2.47	TTL	561,508	54,167	146,518	198,858	352,558	10,092
			VAP	400,161	37,119	91,673	127,692	265,984	6,485
19	234	0.04	TTL	548,186	24,547	334,831	358,031	182,666	7,489
			VAP	394,536	17,483	221,976	238,679	150,175	5,682
20	-17,002	-3.10	TTL	530,950	15,527	331,811	346,305	179,616	5,029
			VAP	355,829	10,414	206,004	215,852	136,430	3,547
21	0	0.00	TTL	547,952	15,152	344,207	358,608	181,722	7,622
			VAP	368,551	10,353	216,245	226,190	136,846	5,515
22	27,362	4.99	TTL	575,314	13,512	40,739	53,958	510,112	11,244
			VAP	413,208	9,078	24,964	33,889	371,848	7,471
23	-810	-0.15	TTL	547,142	263,114	118,775	377,123	159,480	10,539
			VAP	385,769	177,311	74,079	248,434	130,089	7,246
24	-14,423	-2.63	TTL	533,529	48,856	311,526	358,757	168,949	5,823
			VAP	357,393	33,610	193,694	226,404	126,868	4,121
25	-27,321	-4.99	TTL	520,631	29,857	91,167	120,146	393,889	6,596
			VAP	383,752	20,767	56,357	76,689	302,372	4,691
26	25,130	4.59	TTL	573,082	46,738	90,153	135,238	426,169	11,675
			VAP	415,022	30,642	57,248	86,988	319,610	8,424
27	-3,565	-0.65	TTL	544,387	1,570	444,091	445,211	96,437	2,739
			VAP	353,335	1,005	271,724	272,499	78,915	1,921
28	-24,389	-4.45	TTL	523,563	30,891	160,344	190,248	327,275	6,040
			VAP	369,493	19,960	94,012	113,508	251,581	4,404
29	0	0.00	TTL	547,952	17,223	389,144	404,939	135,647	7,366
			VAP	369,858	11,686	248,210	259,228	105,192	5,438
30	-23,163	-4.23	TTL	524,789	32,203	44,015	75,676	441,042	8,071
			VAP	390,353	21,797	26,535	48,020	336,550	5,783
31	-23,450	-4.28	TTL	524,502	22,049	103,478	124,855	391,348	8,299
			VAP	365,147	14,025	58,922	72,619	286,951	5,577
PLAN TOTALS			TTL	16,986,510	2,021,632	4,339,905	6,316,265	10,291,680	378,565
			VAP	12,150,671	1,363,770	2,719,586	4,056,274	7,828,352	266,045

DIST	% OF POPULATION BLACK	% OF POPULATION HISP	% OF POPULATION B+H	% OF POPULATION ANGLO	% OF POPULATION OTHER
18	9.6	26.1	35.4	62.8	1.8
	9.3	22.9	31.9	66.5	1.6
19	4.5	61.1	65.3	33.3	1.4
	4.4	56.3	60.5	38.1	1.4
20	2.9	62.5	65.2	33.8	0.9
	2.9	57.9	60.7	38.3	1.0
21	2.8	62.8	65.4	33.2	1.4
	2.8	58.7	61.4	37.1	1.5
22	2.3	7.1	9.4	88.7	2.0
	2.2	6.0	8.2	90.0	1.8
23	48.1	21.7	68.9	29.1	1.9
	46.0	19.2	64.4	33.7	1.9
24	9.2	58.4	67.2	31.7	1.1
	9.4	54.2	63.3	35.5	1.2
25	5.7	17.5	23.1	75.7	1.3
	5.4	14.7	20.0	78.8	1.2
26	8.2	15.7	23.6	74.4	2.0
	7.4	13.8	21.0	77.0	2.0
27	0.3	81.6	81.8	17.7	0.5
	0.3	76.9	77.1	22.3	0.5
28	5.9	30.6	36.3	62.5	1.2
	5.4	25.4	30.7	68.1	1.2
29	3.1	71.0	73.9	24.8	1.3
	3.2	67.1	70.1	28.4	1.5
30	6.1	8.4	14.4	84.0	1.5
	5.6	6.8	12.3	86.2	1.5
31	4.2	19.7	23.8	74.6	1.6
	3.8	16.1	19.9	78.6	1.5
PLAN TOTALS	11.9	25.5	37.2	60.6	2.2
	11.2	22.4	33.4	64.4	2.2

3. I did not call or direct anyone else to call Judge James Nowlin or any other member of the three-judge federal panel or its personnel on December 23, 1991. I was not in my Austin legislative office on the 23rd at the time the phone call to the court allegedly was made. The telephone number from which the call to the court allegedly was made is on a telephone instrument located in a common area adjacent to my office.

4. I never have called or directed anyone else to call Judge Nowlin or any other member of the panel or its personnel regarding this case, and have never spoken with any of these persons regarding this case, my plans to run for the Texas Senate, or any other aspect of redistricting.

5. I never have asked any person to call or speak with Judge Nowlin or any other member of the panel or its personnel regarding this case, my plans to run for the Texas Senate, or any other aspect of redistricting, and know of no one who did so on by behalf. To my knowledge, no one has spoken with any of these persons on my behalf.

6. On Friday, February 14, 1992, I learned that the Attorney General of the State of Texas had obtained the telephone logs reflecting calls made from my legislative office in Austin. I did not authorize the Attorney General to obtain these records, and did not know he intended to obtain them. I never was asked about my telephone logs before I learned of the allegations made to the United States Supreme Court on Friday, February 14, 1992.

I never was asked whether the allegations were true before they were made to the Supreme Court.

7. On February 14, 1992, immediately after learning of the allegations, I contacted the Attorney General of the State of Texas and informed his office that I have had no contact or communications with the Austin court or any of its personnel concerning this case or redistricting.

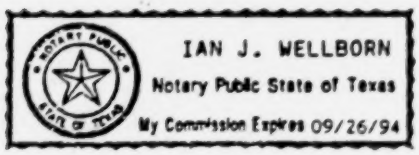
8. I absolutely deny any suggestion that I communicated with Judge Nowlin directly or through anyone else, and I resent the implication that any of us would conduct ourselves in that manner.

9. My first knowledge of the existence and configuration of this Court's interim senate plan came after the plan was announced to the public on December 24, 1991. Before that time, I neither knew nor was informed what the boundaries of the senate district I am running for were to be or the district my home was placed in.

Further affiant sayeth not.

ALAN SCHOOLCRAFT

SUBSCRIBED AND SWORN TO BEFORE ME THIS ___ day of February, 1992, to certify which witness my hand and official seal of office.



Notary Public, State of Texas

IAN J. WELLBORN
Printed Name

Commission Expires: 9/26/94

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	)	
	)	
Plaintiff	)	Civil Action No. 91-2383
	)	(PMW, U.S.C.A., SS, JHG)
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO
STATE OF TEXAS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The State of Texas seeks relief under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, concerning a redistricting plan for the Texas Senate adopted by the Texas Legislature and signed by the Governor on January 8, 1992 (Senate Bill 1 or S.B. 1), approximately three and a half months after the State filed its complaint. On January 9, 1992, the State submitted S.B. 1 to the Attorney General for administrative review under Section 5. We are continuing to examine that plan and our response is due on March 9. Procedures for the Administration of Section (28 C.F.R. 51.9, 51.35, 51.37). Although the State has not sought to amend its complaint to place S.B. 1 at issue in this action, it has moved for "partial summary judgment" and is seeking an expedited ruling from this Court.

The State's primary argument is that it is unnecessary to prove that the plan contained in S.B. 1 is free of the discriminatory purpose and effect proscribed by Section 5 either because the plan already has received Section 5 preclearance from the Attorney General or because it does not constitute a change

from the State's "existing" redistricting plan. In the alternative, the State argues that if preclearance is required for S.B. 1, the plan does not violate the retrogression standard of Section 5 because it is identical to the Senate plan for which preclearance was obtained on November 18, 1991. The State, however, does not seek summary judgment on the issue of discriminatory purpose. Nor does it contend that the issue of whether the plan satisfies the requirements of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, can be resolved on summary judgment. Indeed, the State's moving papers do not even contain a description of the plan, let alone a defense of its merits.

The United States opposes the instant motion, as well as the State's suggestion that an emergency exists warranting an expedited ruling by the Court. Quite simply, the State's motion is premised and dependent upon this Court ignoring the rulings of the three-judge court in the related case of Terrazas v. Slagle, C.A. No. 91-A-426 (W.D. Tex., orders of December 24, 1991 and January 10, 1992).[1] On December 24, 1991, the Terrazas court ordered the State to conduct this year's Senate elections under an interim plan devised by the court. Candidate filing under the court's plan was completed on January 10, 1992, and the campaign is well under way for the March 10, 1992, primary election. S.B. 1's redistricting plan constitutes a voting change subject to preclearance under Section 5, which has not received the

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[1] We are lodging with this Court, in a separate filing, those and other relevant orders in the Terrazas case.

requisite preclearance, because it is different from the plan put in place by the Terrazas v. Slagle court. It is the court's plan against which S.B. 1 must now be compared for purposes of Section 5's retrogression analysis. On that comparison, the State does not seek summary judgment.

Moreover, there exists no emergency requiring a ruling by this Court. S.B. 1 is not capable of implementation for the 1992 election -- even if Section 5 preclearance is obtained -- because of the Terrazas v. Slagle orders, which the Supreme Court has refused to stay. We recognize that the State has appealed those orders and raised some of the very same arguments presented in the instant motion. But unless and until the Terrazas v. Slagle orders are vacated or reversed, the State is not free to implement S.B. 1. Under these circumstances, we believe this Court need not rush into the fray and may wish to await the outcome of the State's pending appeal in Terrazas v. Slagle or a showing that S.B. 1 is capable of implementation if preclearance is obtained.

I. STATEMENT OF FACTS [2]

1. The Texas Senate consists of 31 members elected from single-member districts. Senators are elected to four-year, staggered terms. In 1992, all 31 Senate seats are up for

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[2] The United States does not disagree with the State's statement of Material Facts Not In Genuine Issue, except with respect to paragraph 5 of the statement which addresses the legal question put at issue by this motion. However, the statement does not adequately describe the facts surrounding the State's effort to adopt and implement a Senate redistricting plan for the 1992 elections. See also Statement of Genuine Issues.

election pursuant to Article 3, §3 of the state constitution which requires that the full Senate stand for election following the enactment of a redistricting plan. In 1992, the primary is to be held on March 10, the primary runoff on April 14, and the general election is on November 3, 1992.

2. On September 20, 1991, the State of Texas filed its complaint in the instant action seeking relief under Section 5 with respect to a redistricting plan for the Texas Senate.

3. The plan for which the State sought relief in its complaint had been adopted over three months earlier by the State. That plan, enacted in Senate Bill 31, was passed by the Texas Legislature in May 1991 and then became law on June 16, 1991, when the period for veto by the Governor ended.

4. Prior to the filing of this action, S.B. 31 also had been submitted to the Attorney General for Section 5 review, on August 9, 1991. At the time this action was filed, the Department of Justice was proceeding with its review of the voluminous data provided by the State in connection with its S.B. 31 submission and the submission of the House, congressional, and Board of Education plans.[3]

5. On October 8, 1991, the 60th day after receiving the submission of S.B. 31, the Attorney General received a letter from the State withdrawing its submission and submitting a new Senate redistricting plan. Accordingly, the Attorney General

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[3] The House plan was submitted to the Attorney General on September 12, the congressional plan on September 17, and the Board of Education plan on September 19.

wrote the State (also on October 8) that no Section 5 determination would be made on S.B. 31 since the plan had been withdrawn from Section 5 review and the State no longer intended to implement it. 28 C.F.R. 51.25 and 51.35.

6. The new plan received on October 8 resulted from a settlement the previous day of state court litigation challenging the S.B. 31 plan. Quiroz v. Richards, C.A. No. C-4395-91-F (332nd Jud. Dist., Hidalgo Cty.). The same settlement subsequently was entered on October 11 in parallel state court litigation brought in the same state district court. Mena v. Richards, C.A. No. C-454-91-F (332nd Jud. Dist., Hidalgo Cty.).[4] On October 15, 1991, the State filed a First Amended Complaint in the instant case seeking relief under Section 5 with respect to the Quiroz/Mena plan rather than S.B. 31. On November 18, 1991, the Attorney General granted preclearance to this plan and the State thereupon began implementation of the plan, including the opening of candidate qualifying.[5]

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[4] The Negrete applicants for intervention in the instant case are among the plaintiffs in the Mena state court suit. Both suits challenged the Senate redistricting enacted in S.B. 31 alleging that the plan violated provisions of the state constitution that protect minority voting rights.

[5] This action originally also dealt with the statewide plans for the Texas congressional delegation, the Texas Board of Education, and the Texas House of Representatives. As noted, these plans also were submitted to the Attorney General for administrative review under Section 5. The congressional and Board of Education plans received preclearance from the Attorney General on November 18, 1991, and in its December 2, 1991, Memorandum Opinion and Order, this Court held that the Attorney General's preclearance action mooted any necessity for review of these plans in this lawsuit. With respect to the House of

(continued...)

7. On December 17, 1991, the Texas Supreme Court held that the state district court in Quiroz and Mena had abused its discretion in entering judgment ordering into effect the Senate redistricting plan set forth in the parties' settlement agreement. The district court was ordered to vacate these judgments and reconsider the settlement agreement in light of certain factors specified by the State Supreme Court. Terrazas v. Ramirez, C.A. No. D-1817. The State accordingly halted its implementation of the Quiroz/Mena plan.

8. In a separate federal suit concerning the Senate redistricting issue, Terrazas v. Slagle, C.A. No. 91-A-426 (W.D. Tex.), the three-judge district court held a hearing from December 10 to 13, 1991 on plaintiffs' motions for preliminary relief.[6] On December 24, 1991, the court issued a Summary Opinion and Judgment ordering into effect for the 1992 Senate elections an interim, court-fashioned plan. The court concluded that because there was no legally enacted state plan that had

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[5](...continued)
Representatives, the Attorney General interposed a Section 5 objection on November 12, 1991. A three-judge district court in Texas ordered into effect an interim plan for the regular 1992 House elections, Terrazas v. Slagle, 91-CV-425 (W.D. Tex. Dec. 24, 1991), and the State has enacted a permanent plan for elections commencing in 1994, which plan the State has indicated will shortly be submitted to the Attorney General for administrative Section 5 review.

[6] The plaintiffs alleged that the plan enacted in S.B. 31 violated the United States Constitution and the Voting Rights Act, and their allegations included claims of minority vote dilution and partisan gerrymandering. The Terrazas applicants for intervention in this case are plaintiffs in the Texas federal litigation.

received Section 5 preclearance, it should determine whether the plan the State had enacted in S.B. 31 (later withdrawn from Section 5 review) should be implemented. The Terrazas plaintiffs had alleged that the plan violated the "results" standard contained in Section 2 of the Voting Rights Act, 42 U.S.C. 1973, in that it denied black and Hispanic citizens an equal opportunity "to participate in the political process and to elect candidates of their choice." The district court found S.B. 31 deficient in the areas of Dallas and Tarrant Counties, Harris County, and Bexar County, south Texas and the Rio Grande Valley, and ordered into effect its own plan for the state Senate, which differed not only from S.B. 31 but also from the Quiroz/Mena plan. The court issued an Amended Order and Judgment on January 10, 1992.[7]

9. Subsequent to the decision of the Texas Supreme Court in Terrazas v. Ramirez and prior to the issuance of the December 24th Terrazas v. Slagle order, the Governor called the Texas

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[7] The Terrazas plaintiffs also filed separate suits, identically captioned, which address the state House redistricting (C.A. No. 91-A-425), and the congressional redistricting (C.A. No. 91-A-428). The hearing held from December 10 to 13 also dealt with the House and congressional plans. In its December 24, 1991 ruling, the court ordered into effect a House redistricting plan for the 1992 elections which altered the legislatively adopted plan in those areas of the state where the Attorney General had interposed a Section 5 objection. With respect to the congressional plan, the court denied plaintiffs' motion for relief.

United States Circuit Judge Garwood dissented in part from the December 24 order, on the ground that it should have provided that the plans ordered for the Senate and House would be vacated if the State timely adopted new plans which were precleared and not found invalid by any court.

Legislature into special session for the purpose of adopting a revised Senate redistricting plan. The session commenced on January 2, 1992, and on January 8 a new Senate plan was adopted by the Legislature and signed by the Governor (Senate Bill 1).[8] This plan is identical to the plan which was the subject of the settlement in Quiroz and Mena. The State also enacted a bill in the special session which provided for the primary to be postponed from March 10 to April 11, 1992, if that would result in the Terrazas v. Slagle court allowing the State to implement S.B. 1.[9] However, under the state constitution, a legislative enactment (other than a general appropriation act) does not become law until 90 days after the adjournment of the session in which it was adopted, unless it is passed by a two-thirds vote in each house. Tx. Const. art. III, §39. Neither S.B. 1 nor the election schedule bill passed by this margin.

10. The State of Texas moved the district court in Terrazas v. Slagle to vacate its order implementing the court-fashioned Senate redistricting plan and order instead the legislative plan embodied in S.B. 1. On January 10, the district court issued an Order and Judgment denying this motion and finding that S.B. 1

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[8] The special session also was called to consider the enactment of a revised plan for the state House. The plan which subsequently was adopted is not to be implemented until the 1994 elections, with the 1992 elections to be held pursuant to the plan ordered in Terrazas v. Slagle.

[9] On January 10, 1992, the State submitted to the Attorney General for administrative Section 5 review the voting changes occasioned by this enactment. The statutory 60-day review period ends on March 10, 1992. Neither the instant motion nor any other pleading in this action seeks relief regarding these changes.

"fails to satisfy the Sec. 2 requirements of the Voting Rights Act." Slip. op. at 12-13. The court also found that implementation of S.B. 1 would inappropriately require postponing the primary election until at least mid-April.[10] The State appealed and sought a stay pending appeal, however, the stay application was denied by the Supreme Court on January 16, 1992. The State has filed its Jurisdictional Statement and a motion for expedited review.

11. Presently pending before the district court in Terrazas v. Slagle is a motion filed by the State, on February 10, 1992, renewing the request for the court to vacate its order compelling use of the court-ordered Senate plan for the 1992 elections. The State also moved on February 10 for recusal of one of the three members of the Terrazas panel, United States District Judge Nowlin.[11]

12. Election officials of the State of Texas are proceeding to implement the court-ordered plan for the March 10, 1992 primary election. The candidate qualification period closed on January 10, 1992, and voting under the State's "early voting" system will begin on February 19, 1992.

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[10] United States Circuit Judge Garwood dissented, stating that the court should first allow the State the opportunity to obtain preclearance of S.B. 1 and then consider whether S.B. 1 complies with Section 2.

[11] The basis for these motions is in part the information set forth in the excerpted deposition of State Representative George Pierce which accompanies the State's motion for partial summary judgment.

II. ARGUMENT

Section 5 of the Voting Rights Act provides that covered jurisdictions, including the State of Texas, may not implement any change affecting voting unless and until federal preclearance is obtained, either from this Court or the United States Attorney General. To obtain preclearance, Section 5 places on Texas the burden of demonstrating that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]."[12] Georgia v. United States, 411 U.S. 526 (1973). In addition, preclearance must be denied where the change presents "a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2).[13]

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[12] Section 14(c)(3) of the Act, 42 U.S.C. 19731(c)(3), defines "language minority group" to include persons "of Spanish heritage."

[13] By the instant motion, the State seeks to address only one aspect of Section 5's nondiscrimination test--whether the change is nonretrogressive. In Beer v. United States, 425 U.S. 130, 141 (1976), the Supreme Court held that a change may not be precleared under the effect prong of the test where it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." However, a conclusion that the State's redistricting plan is nonretrogressive would not end the Section 5 inquiry. The State also would need to prove that the plan is free of a discriminatory purpose, Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), sum. aff'd, 459 U.S. 1116 (1983), and the Court might be called upon to resolve issues regarding whether the plan violates the Section 2 "results" standard.

A. There Are No Exigent Circumstances That Warrant Expedited Consideration of the State's Motion

Throughout this litigation, the State has urged that this Court must immediately grant relief under Section 5 to permit the State to implement its four statewide redistricting plans at the regularly scheduled March 10, 1992 primary election. As suggested by the United States, the Court has declined to act on these requests, instead deciding that judicial economy would be best served by allowing the administrative preclearance process (initiated by the State) to run its course.[14] This resulted in three of the four plans being precleared in mid-November, in sufficient time for implementation in 1992, and with respect to the fourth plan (for the state House) the State decided after the objection to defer implementing a legislatively adopted plan until the 1994 elections. Because of the Texas Supreme Court's decision in Terrazas v. Ramirez, supra, the State was unable to implement the precleared Senate plan.

Similarly, the State is mistaken in now claiming that this Court must immediately rule on the Senate redistricting plan adopted on January 8, 1992. As matters now stand, the rulings in Terrazas v. Slagle preclude implementation of S.B. 1 even if preclearance were granted under Section 5. The State is actively

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[14] As set forth in the memorandum filed by the United States on October 25, 1991, in response to the State's Motion for Expedited Answer and Expedited Pretrial Conference, Section 5 declaratory judgment suits are de novo proceedings, not actions to review the Attorney General's determination.

preparing to hold a primary in less than a month pursuant to the plan ordered in Terrazas v. Slagle, and does not now contend that even if all legal obstacles to implementation of S.B. 1 were eliminated, the plan could be used for the March 10 primary. Indeed, its effort here could not be aimed at allowing it to hold the 1992 elections pursuant to S.B. 1 since the Terrazas court, on January 24, 1992, enjoined State officials, including the Attorney General, from taking any action in any "pending or subsequently filed litigation (other than this action) that would conflict or interfere with this Court's Orders [which provide for implementation in 1992 of the court-ordered Senate plan]."

Furthermore, the legal standing of the redistricting plan enacted in S.B. 1 is open to doubt since the Terrazas v. Slagle court has determined that the plan violates Section 2 of the Voting Rights Act. Of course, the possibility exists that the Supreme Court will reverse, or the Terrazas court will grant the State's motion to vacate its order. However, judicial economy would best be served by this Court deferring action until further developments in the Terrazas v. Slagle litigation indicate whether something more than a mere possibility exists that the plan could be implemented.

B. The Senate Redistricting Plan Adopted by the State on January 8, 1992 Constitutes a Voting Change Subject to Section 5 Preclearance

The State's claim that S.B. 1 is not a change subject to Section 5 review is built on the sands of a single faulty premise. The "crux" of its argument is that the redistricting

enacted in S.B. 1 is identical to the Quiroz/Mena settlement plan previously precleared by the Attorney General. Therefore, according to the State, it follows that the S.B. 1 plan already has been precleared or does not represent a voting change subject to preclearance.[15] State's Memorandum, at 5. However, the State blinks at the obvious -- between Quiroz/Mena and S.B. 1 came Terrazas v. Slagle, and because S.B. 1 represents a change from Terrazas it is subject to Section 5 preclearance.

The determination as to whether S.B. 1 differs from the existing practice, and thus constitutes a "change," is primarily a factual one and rests on an analysis of whether S.B. 1 differs from the redistricting plan currently "in force or effect," i.e., the plan that would be implemented if the election were held today. Perkins v. Matthews, 400 U.S. 379, 394-395 (1973); accord City of Lockhart v. United States, 460 U.S. 125 (1983).[16] There

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[15] The State's claim that preclearance already has occurred rests on the "identity of the plans" argument, and the State is not contending that the Attorney General has literally granted preclearance to S.B. 1.

[16] In Perkins, the question presented was what practice or procedure was "in force or effect" on the coverage date because no intervening change has occurred prior to the effectuation of the change there at issue. The Court held that the determination of what was "in force or effect" on the coverage date was dependent on determining what practice would have been used if an election had been held on that date.

Section 5 literally requires Texas to obtain preclearance whenever it "enact[s] or seek[s] to administer any voting ... practice[] or procedure ... different from that in force or effect on November 1, 1972" (the coverage date). However, once intervening changes are adopted and implemented, the new provision generally is compared to the existing practice or procedure. City of Rome v. United States, 446 U.S. 156, 182 (1980).

can be no question but that the plan "in force or effect" is the plan ordered by the district court in Terrazas v. Slagle.

S.B. 1 clearly differs from the court-ordered plan and thus may not be implemented without Section 5 preclearance. The fact that the redistricting plans that immediately precede and follow the Terrazas plan are identical in substance does not alter the fact that a change has occurred. See Gresham v. Harris, 695 F.Supp. 1179 (N.D.Ga. 1988), sum. aff'd sub nom., Poole v. Gresham, 110 S. Ct. 2556 (1990); Dotson v. City of Indianola, 521 F. Supp. 934, 943 (N.D. Miss. 1981), sum. aff'd, 456 U.S. 1002 (1982) (once a voting practice has been precleared, a jurisdiction that seeks to return to the practice in effect prior to the precleared change must obtain Section 5 preclearance).[17]

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[17] As set forth below, the State contends that the Terrazas v. Slagle plan may not serve as the benchmark for judging retrogression because it has not been precleared. To the extent that the State also claims that this lack of preclearance disables the Terrazas plan from serving as the basis for evaluating whether a change has occurred, this argument fails for the reasons set forth infra.

The State characterizes the "change" issue in terms of whether a change in the form of enactment, but not the substance, triggers Section 5 review (i.e., the change between the plan being enacted by state court order in Quiroz and Mena, and the plan's enactment in S.B. 1). Irrespective of whether the State is correct on this question, the State's formulation ignores the presence of the intervening Terrazas plan, which is legally enforceable under Section 5 despite the lack of preclearance. Also, the State's reliance on the Supreme Court's recent decision in Presley v. Etowah County, 60 U.S.L.W. 4135 (U.S. Jan. 28, 1992), is misplaced. That case dealt with whether a transfer of powers possessed by elected officials constitutes a voting practice or procedure within the meaning of Section 5, an issue completely unrelated to the benchmark issue in this case. The State also cites Morris v. Gressette, 432 U.S. 491 (1977), where the Court held that the Attorney General's administrative Section 5 decisions are nonreviewable. This also is inapposite.

C. The Terrazas Plan Forms the Proper Benchmark for Determining Whether S.B. 1 Satisfies the Retrogression Test

The State's claim that S.B. 1 is not retrogressive as a matter of law also rests on the mistaken conclusion that S.B. 1 should be compared to the identical Quiroz/Mena plan. This too is incorrect. The proper benchmark for judging retrogression is the redistricting plan ordered by the United States district court in Terrazas v. Slagle.

As set forth in the Attorney General's Procedures for the Administration of Section 5, the retrogression benchmark normally is "the voting practice or procedure in effect at the time of the submission." 28 C.F.R. 51.54(b)(1). Thus, following initial coverage under Section 5, the first enactment is compared to the practice or procedure in effect on the coverage date, and generally as each new practice or procedure is precleared, it becomes the benchmark for evaluating the next matter which is enacted or to be administered. 28 C.F.R. 51.54(b).

The State contends, however, that the Terrazas v. Slagle plan is disqualified because it has not received Section 5 preclearance. We agree with the State that, in determining the benchmark for retrogression purposes, policy concerns may preclude the practice or procedure in effect from serving as the benchmark and that, as noted by the State, a plan that has not been precleared and is subject to preclearance may not serve as

the retrogression benchmark. 28 C.F.R. 51.54(b).[18] The error in the State's argument is that, as a court-ordered plan, the Terrazas v. Slagle plan is legally erforceable under Section 5 even though it has not undergone Section 5 review. Thus, its unprecleared status is of no import in determining the retrogression benchmark.

The State specifically relies on the Attorney General's regulation set forth at 28 C.F.R. 51.54(b)(3) for the proposition that the Terrazas plan is not the benchmark. State's Memorandum at 9, fn. 2. This regulation provides: "The implementation and use of an unprecleared voting change subject to Section 5 review under §51.18(a) does not operate to make that unprecleared change a benchmark for any subsequent change submitted by the jurisdiction." (Emphasis added.) Section 51.18(a) provides in turn that: "Changes affecting voting that are ordered by a Federal court are subject to the preclearance requirement of section 5 to the extent that they reflect the policy choices of the submitting authority."

This section reflects the decisions of the Supreme Court in McDaniel v. Sanchez, 452 U.S. 130 (1981), and Connor v. Johnson, 402 U.S. 690 (1971). In McDaniel, the Court held that Section 5

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[18] Otherwise, a jurisdiction might adopt a series of retrogressive changes, submit the final change in the series, and argue that, as compared with the immediately preceding practice, the change is nonretrogressive. In its most recent consideration of Section 5, Congress recognized that policy concerns may properly be considered in determining whether the existing practice may serve as the retrogression benchmark. S. Rep. No. 417, 97th Cong., 2nd Sess. 12, n. 31 (1982).

review is required when a federal court approves and orders into effect a redistricting plan that reflects the policy choices of the covered jurisdiction. The Court also reaffirmed its holding in Connor that a plan formulated by a federal court is outside the scope of Section 5.

The Terrazas v. Slagle plan was formulated by that court and, as evidenced by the State's ardent opposition to the plan, it does not reflect the State's policy choices. Accordingly, it is not subject to Section 5 preclearance and its unprecleared status does not disqualify it from serving as the benchmark.

In previous Section 5 declaratory judgment actions, this Court has ruled that court-ordered redistricting plans may serve as the benchmark for judging retrogression. State of Mississippi v. Smith, 541 F. Supp. 1329, 1333 (D.D.C. 1982) (the submitted plan "must, at a minimum, be shown not to be retrogressive relative to the plan ordered into effect by the Three-Judge Mississippi Court"); State of Mississippi v. United States, 490 F. Supp. 569, 582 (D.D.C. 1979) (the court-ordered plan "must now be considered the preexisting plan and the benchmark"), sum. aff'd, 444 U.S. 1050 (1980).[19]

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[19] In certain circumstances, policy concerns may arise with respect to treating a court-ordered plan as the benchmark, unrelated to the preclearance question raised by the State. For example, in State of Mississippi v. United States, Justice Stevens, concurring in the judgment, disagreed with the district court's conclusion that the 1979 court-ordered plan was the benchmark. He cited the fact that it was a back-up plan that had not actually been implemented, and thus, he argued, any changes to that plan could not have retrogressed minority voting potential. He also expressed concern that "to require a state

(continued...)

For these reasons, the Terrazas v. Slagle plan constitutes the benchmark plan for determining whether the redistricting plan adopted in S.B. 1 is retrogressive.

D. The State Has Failed to Present Any Factual Information to Meet its Burden of Demonstrating That S.B. 1 is Not Retrogressive

The State's retrogression argument is based entirely on its conclusion that there is no substantive difference between the plan enacted in S.B. 1 and the plan it contends is the benchmark, the Quiroz/Mena plan. The state has presented no evidence whatsoever comparing S.B. 1 to the Terrazas v. Slagle plan.[20] Thus, the State does not seek a ruling on the absence of a retrogressive effect if this Court determines that the Terrazas plan is the proper benchmark.[21]

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[19](...continued)
legislature to predict what court-ordered plans may be entered while a Voting Rights Act suit is pending and then to draw its plan to ensure that no dilution occurs seems to me to be a futile exercise clearly not required by the statute." 444 U.S. at 1052. However, Justice Stevens recognized that court-ordered plans may serve as the benchmark, and he wrote that a 1975 court-ordered plan (which had been imposed and implemented prior to the enacted plan at issue) was the benchmark in that case.

Whether or not these concerns might, in the appropriate case, lead this Court to disqualify a court-ordered plan from serving as the benchmark, they have no relevance here where the court-ordered plan is being implemented and was adopted prior to the enactment of the State's preferred plan.

[20] For example, the State has not provided this Court with any census data or maps for the two plans, which necessarily would be the starting point for comparing them.

[21] The retrogression comparison between S.B. 1 and the Terrazas v. Slagle plan is not necessarily a simple one. The Terrazas court concluded that its plan provides minority voters with a greater electoral opportunity while the Mena court, in a (continued...)

CONCLUSION

For the foregoing reasons, this Court may wish to defer ruling on the instant motion pending action by the Supreme Court on the State's appeal in Terrazas v. Slagle or a showing that S.B. 1 is capable of implementation if preclearance is obtained. On the merits of the motion, the Court should deny the State's motion for partial summary judgment on all grounds and order the State to amend its complaint if it seeks to pursue preclearance of S.B. 1 before this Court.

Respectfully submitted,

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[21](...continued)
decision rendered on January 13, 1992, found that S.B. 1 is superior to Terrazas. (The United States will lodge a copy of this unreported decision with the Court along with the relevant unreported decisions in Terrazas.)

Supreme Court, U.S.
F I L E D
MAR 5 1992
OFFICE OF THE CLERK

No. 91-1270

In The

Supreme Court of the United States

October Term, 1991

ANN RICHARDS, Governor of Texas, *et al.*,

Appellants,

v.

LOUIS TERRAZAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

APPELLEES' MOTION TO AFFIRM

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No. 91-1270

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October Term, 1991

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Appellants,

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LOUIS TERRAZAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

APPELLEES' MOTION TO AFFIRM

Louis Terrazas, Ernest Angelo, Jr., Tom Craddick, Robert A. Estrada, and Sim D. Stokes, III ("Appellees"), respectfully move to affirm the judgments of the United States District Court for the Western District of Texas in this case. Sup. Ct. R. 18.6. The reasons for affirming the district court's judgments appear below.

STATEMENT OF THE CASE

As in past decades, the attempt by the State of Texas to redistrict its legislature following the release of the 1990 decennial census has been chaotic. Legislative redistricting plans for the Texas House of Representatives and

Texas Senate were enacted in June 1991, but the state did not submit them to the Department of Justice for preclearance under section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c ("section 5") until August. After enactment, the state's plans were attacked by Appellees in the court below under section 2 of the Voting Rights Act, 42 U.S.C. §1973 ("section 2") and the Fourteenth and Fifteenth Amendments to the United States Constitution and by certain minority groups in Texas state court on state law grounds. The state court litigation over the legislature's senate plan ended in October 1991, when the initial legislative plan was cast aside in favor of a plan agreed upon by the state and minority group lawyers (the "*Quiroz* Plan"), which was approved by a state district judge.

The legislature's plan for the Texas House fared no better. In November, the Justice Department refused to preclear the house plan, leaving Texas with no plan for redistricting the Texas House. Appellees therefore requested the court below to implement an interim house plan. A hearing on this request was scheduled for the week of December 9, 1991.

After agreeing to the *Quiroz* Plan, the state withdrew the legislature's senate plan from preclearance consideration and replaced it with the *Quiroz* Plan. To prevent implementation of an agreed plan invalid under both state and federal law, Appellees sought a writ of mandamus from the Texas Supreme Court and injunctive relief from the three-judge panel below. Following preclearance of the *Quiroz* Plan by the Justice Department in November 1991, Appellees asked the court below to enjoin implementation of the illegal state court plan and to exercise its equitable power to adopt an interim senate redistricting plan. *See* Appendix A. Appellees requested "an injunction against the conduct of elections

under the illegal [*Quiroz*] redistricting plan . . . [,] an order implementing [Appellees'] senate plan on an interim basis [,] and an order scheduling hearing on the first two matters on December 10, 1991." *Id.* at A-2. The lower court scheduled hearings on all of Appellees' requests for interim relief for December 10.

On December 10, the Texas Supreme Court heard Appellees' petition for writ of mandamus to compel the vacatur of the *Quiroz* Plan. That morning, the state supreme court took Appellees' petition under consideration, and Appellees carried their attack on the *Quiroz* Plan and the state's other plans to the federal court for trial on their request for preliminary injunction.

Trial before the lower court lasted four days. Over three hundred exhibits, including maps, compilations of statistical data, and population studies, were admitted. Twenty-five witnesses testified on behalf of the parties and *amici*, who included Appellees, Appellants Ann Richards, Dan Morales, and John Hannah (collectively, "the state"), several state senators, the commissioners' courts of the three largest counties in Texas, and the Department of Justice. A major issue during the trial was the imminence of the Texas primary elections, which have long been scheduled for "Super Tuesday" – March 10, 1992. Secretary of State John Hannah, Texas' chief election officer, testified that January 10, 1992, was the "drop dead" date for candidate filing in order to allow preparation for a March 10 primary election. Statement of Facts, Hearing on Plaintiffs' Request for Preliminary Injunction and Implementation of Interim Plan, December 11, 1991, at 94. Secretary Hannah also testified that postponing the primary election could cost the state ten to fifteen million dollars, confuse voters, reduce voter

turnout (especially among minority voters), and void voter registration certificates. Appendix to Jurisdictional Statement for Appellants ("State's Appendix") at 11a-12a. He also testified that extending the deadline beyond January 10 would delay the January 13 ballot certification deadline and the January 24 absentee ballot mailing. *Id.* At the conclusion of the trial on December 13, the lower court took Appellees' requests for preliminary injunctions under advisement.

On December 17, 1991, the Texas Supreme Court ordered the agreed judgment adopting the *Quiroz* Plan vacated. *Terrazas v. Ramirez*, ___ S.W.2d ___, 35 Tex. Sup. Ct. J. 256 (Dec. 17, 1991). Governor Richards then issued a call for a special session of the legislature, but that session was not to begin until January 2, which was the statutory deadline for candidate filing. TEX. ELEC. CODE ANN. §172.023(a) (Vernon Supp. 1992). Less than two weeks before the close of the candidate qualification period, the state thus was left with no legally fashioned or precleared redistricting plan for either the senate or the house.

Faced with this situation, which largely was the by-product of the state's own ill-chosen actions, the three-judge panel issued interim orders on December 24, 1991. Those orders created new plans for the house and senate to remedy the discrimination caused by the illegal plans. The court "sought diligently, where appropriate, to adhere to the legitimate districting intent of the state legislature and, where federal constitutional and statutory prohibitions are not offended, to give effect to the will of that body." State's Appendix at 48a. The court could not, of course, give effect to unlawful expressions

of legislative will, but it did not create plans out of whole cloth. Instead, it modified the legislative plans in order to cure the illegalities, strove to place counties in the districts they would have been in under the legislature's lines, and "made every attempt to preserve the legislature's will in those areas of the state where no violations of the Voting Rights Act were found to occur." *Id.* at 43a. The decision was meant to "provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law, and . . . to provide for the holding of elections in Texas without delay and in accordance with state law." *Id.* at 47a. Other factors compelling the creation of interim plans were the need to protect minority voting rights threatened by the state's delay (measurable in months) in submitting its plans to the Justice Department, and the legislature's demonstrable deference to partisan concerns and incumbent protection. *Id.* at 48a.

The determination that the prior legislative plans and the *Quiroz* Plan diluted minority voting rights was unanimous. The Honorable Will Garwood, United States Circuit Judge for the Fifth Circuit Court of Appeals, dissented in part, but only as to the timing of the relief granted. Rather than granting immediate relief, Judge Garwood would have deferred to the then-upcoming special session and waited to see whether the state was able to adopt and obtain preclearance of new plans by January 17. If the state proved able to do so, Judge Garwood believed the court's interim plans should be withdrawn. *Id.* at 51a.

Ten days after the issuance of the court's interim plans, the Texas Legislature met in special session. That

session yielded plans for both the house and the senate. The legislation pertaining to the house left the court-ordered plan in effect for the 1992 electoral round. In the case of the senate, however, the legislature simply adopted the *Quiroz* Plan that had been invalidated by the Texas Supreme Court. Neither plan received a two-thirds vote in both houses, and the statutes therefore are not effective until the middle of April 1992, ninety days after passage. TEX. CONST. art. 3, §39.

As soon as the governor signed them, the new house and senate plans were submitted to the Department of Justice for preclearance review. As of the date of this motion, the department has not announced its decision.

The state twice asked the lower court to stay its order, once before the special session and once afterwards. On January 10, 1992, the three-judge court denied both of these motions, noting that the Justice Department had notified the state that its prior preclearance of the senate plan fashioned in the now-vacated stated court judgment did not obviate the need for preclearance of the newly enacted plan. State's Appendix at 10a. Since the new legislative plans had not been precleared by the Department of Justice – a fact still true today – the court found that its plans offered the only practicable and legal redistricting plan for the March primary. *Id.* at 12a-13a.

After this ruling, the state filed the instant appeal. Apparently because the legislature was content with the lower court's plan for the house, the state does not attack it in this Court. However, it claims that the senate plan suffers from various infirmities.

After it filed its appeal, the state requested an emergency stay of the March 10 primary. On January 16, 1992, this Court denied the stay request. *Richards v. Terrazas*, ___ U.S. ___, 112 S.Ct. ___ (1992). On February 13, the state filed a second motion for emergency stay, which the Court denied on February 15. Finally, last week, on February 24, the Court denied the state's motion to expedite consideration of its jurisdictional statement and grant summary reversal of the lower court before Appellees' could respond.

Appellees' ability to respond to the state's jurisdictional statement is valuable because it affords them the opportunity to correct the state's numerous factual inaccuracies. These errors, and the state's careful omission and arrangement of facts, cloud both the problems the lower court confronted and the solution it reached.

First, the lower court did not implement its interim senate redistricting plan until after the Texas Supreme Court had vacated the *Quiroz* Plan. Both of these judicial acts preceded the enactment of a second legislative plan in the January special session. The new statute, Senate Bill 1 ("SB1"), did not exist when the lower court acted. The state's implication that SB1 was admitted into evidence at the preliminary injunction hearing in December is incorrect. *See* Jurisdictional Statement at 3 n.2.

Second, the state wrongly claims that SB1 has been precleared by the Department of Justice. *See, e.g.*, Jurisdictional Statement at 7 (referring to SB1 as "the precleared, legislatively-enacted Senate plan."). This claim, which is repeated throughout the state's argument, rests on its belief that SB1 need not be precleared because its lines

mirror those in the *Quiroz* Plan. The Department of Justice has informed the state that any legislative redistricting plan, even one identical to the *Quiroz* Plan, must receive preclearance before implementation. *See* Letter of John R. Dunne, Assistant Attorney General, Appendix B. Moreover, the United States District Court for the District of Columbia denied a motion by the state seeking a summary judgment holding that SB1 has been precleared. Memorandum Order, Feb. 25, 1992, *State of Texas v. United States*, Civil Action No. 91-2383 (PMW [USCA], SS, JHG), in the United States District Court for the District of Columbia, Appendix C.

To lend an aura of legitimacy to its arguments, the state declines to disclose these facts. The state can portray its attempts at incumbent protection as concerns for federalism only if it ignores the facts and its own failures. Its attack upon the judgment below is premised entirely upon the contention that SB1 was valid and enforceable under state and federal law, but the lower court nonetheless cast it aside. Lacking both preclearance and a legally expedited effective date, the statute fails on both counts. Due to these failures, the district court was forced to adopt an interim plan for the Texas Senate. This action was necessary and proper, and the state points to nothing that justifies reversal of the ruling below.

REASONS FOR AFFIRMING THE JUDGMENTS

The court below correctly exercised its equitable jurisdiction to create and implement an interim senate plan that both preserved the existing primary schedule

and improved minority voting rights. The state raises no question that would justify a reversal of the lower court's rulings. Because the Jurisdictional Statement fails to justify reversal of the judgments below, and because the lower court acted within its discretion under the facts, the judgments below should be affirmed.

A THE QUESTIONS PRESENTED BY APPELLANTS ARE INSUBSTANTIAL.

The state has raised only two questions concerning the interim plan issued by the lower court. These questions challenge only the lower court's power to grant interim relief. Aside from a brief reference to the population deviation of the interim plan, discussed *infra*, the state does not contend that the remedy is flawed. Instead, it claims the three-judge court did not have the power to act as it did. These claims are insubstantial.

1. The Lower Court Was Not Acting Under Section 5 And Did Not Supplant A Precleared Plan.

The state's first question is two-fold: whether "a local three-judge federal court [a] acting under section 5 of the Voting Rights Act [b] [can] substitute a court-crafted redistricting plan for a legislatively approved plan that obtained section 5 preclearance . . . " Jurisdictional Statement at i. It is able to engineer a negative answer only because it mischaracterizes both the source of the lower court's power and the status of Texas' redistricting law at the time it acted.

First, the three-judge court was not "acting under section 5 of the Voting Rights Act . . . " Instead, it was reviewing Appellees' challenge to the *Quiroz* Plan contained in the preliminary injunction application filed on November 27, 1991. In that application, Appellees left little doubt as to the basis for this challenge:

> Plaintiffs are likely to succeed on their claims that the districts created by the Quiroz Plan violate the protections afforded to racial and language minorities by the Voting Rights Act and the one person/one vote guarantees of the Fourteenth and Fifteenth Amendments of the Constitution.

Appendix A at 6. When the lower court issued its decision, it acted upon this application. Moreover, Texas then lacked senate and house plans based on the 1990 census: the senate plan had been voided by the Texas Supreme Court, and the house plan had been denied preclearance by the Justice Department. Thus, when the court considered whether Appellees' request for implementation of interim plans should be granted, it had to fill a void created by the state's failure to adopt lawful plans and the admitted unconstitutionality of the lines drawn after the 1980 census. To allow the elections to proceed on schedule, the court exercised its power to fashion interim relief, a power this Court often has recognized. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *Mahan v. Howell*, 410 U.S. 315, 332 (1973); *Reynolds v. Sims*, 377 U.S. 533, 587 (1964); *see also McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988).

Second, the lower court did not supplant a precleared legislative plan with its interim senate plan. The state's

contention that SB1 was a precleared senate plan on December 24 (when the interim plan issued) is both legally and factually incorrect. The legislature did not enact SB1 until two weeks after the December 24 order was issued. Moreover, even after it was passed it was ineffective under state law. *See supra* at 6. When the lower court acted, the statute did not exist; today, it remains ineffective under federal and state law. The lower court cannot be said to have supplanted a non-existent law.

Third, the state's claim that SB1 is a precleared plan is erroneous. This argument rests on the claim that SB1 is identical to the *Quiroz* Plan adopted by the state court, which was precleared in November. The state's position contradicts its prior actions: not only did it submit SB1 to the Department of Justice for preclearance, it also sought summary judgment preclearing SB1. *See* State of Texas's Motion for Partial Summary Judgment, filed in *State of Texas v. United States of America*, Civil Action No. 91-2383 (PMW [USCA], SS, MB), Feb. 5, 1992. More importantly, this argument misinterprets the effect of the issuance of the interim senate plan and the scope of section 5 of the Voting Rights Act.

When SB1 was passed, Texas' senate districts were determined by the lower court's interim plan. As a result, the court's plan serves as a benchmark against which to compare SB1 to ascertain whether the latter constitutes a retrogression in minority voting strength. *See Mississippi v. Smith*, 541 F. Supp. 1329, 1333 (D.D.C. 1982), *appeal dismissed*, 461 U.S. 912 (1983); *see also* 28 C.F.R. § 51.54(b). Further, even if the *Quiroz* Plan were considered to be the benchmark for comparison of SB1, the legislative plan could not be considered precleared. SB1 cannot escape

preclearance review merely because it logically cannot make minorities worse off than the *Quiroz* Plan – retrogression is only one aspect of a section 5 review. 28 C.F.R. § 51.52-59. The three-judge panel in the District of Columbia aptly explained why the November 1991 preclearance of the *Quiroz* Plan does not insulate SB1 from section 5 review:

> [E]ven if the *Quiroz/Mena* settlement plan were deemed to be the proper benchmark, SB1 would still be subject to preclearance. While the retrogression analysis would be simple inasmuch as SB1 and the *Quiroz/Mena* settlement plan are substantively identical, the analysis of whether SB1's purpose was discriminatory cannot be resolved simply by recognizing that the *Quiroz/Mena* settlement plan had been precleared.

See Appendix C at 9.

Thus, the argument that SB1 is a precleared plan has been rejected by the two authorities charged with enforcing section 5. The determination by the Department of Justice that SB1 is not now enforceable under the Voting Rights Act, *see* Appendix B, is particularly significant because "administrative construction of the Act is persuasive evidence of the original understanding, especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 (1978); *see also Perkins v. Matthews*, 400 U.S. 379, 391 (1971). If the Attorney General does not inform the submitting authority that a submitted change need

not be precleared, this Court can infer that preclearance is required. *See NAACP v. Hampton County Election Commission*, 470 U.S. 166, 179 (1985). *A fortiori*, when the Attorney General informs the submitting authority that preclearance is required, deference to that direct interpretation is warranted. *See Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 39 (1978).

The state's premises – that the lower court acted under section 5 and supplanted a precleared legislative plan – are wrong. The court below acted upon appellees' challenge to the absence of any redistricting plan that satisfied the standards of section 2 and the United States Constitution. Its action was within its power, and the state's effort to miscast the inquiry cannot alter that fact.

Similarly, the state's citation to this Court's recent opinion in *Presley v. Etowah County Commission*, ___ U.S. ___, 60 U.S.L.W. 4135 (Jan. 27, 1992), is misleading. *Presley* holds that the internal allocation of political power among elected officials is not covered by section 5; it does not stand to reason that the legislative enactment through legal means of a redistricting plan originally proposed through illegal ones is outside the scope of preclearance. More to the point, *Presley* does not apply here, where the lower court acted under section 2 to provide a remedy for the absence of any legally valid redistricting plan. The state's revisionist portrayal of the lower court as a section 5 tribunal, and consequently one of limited jurisdiction, is wrong and should be rejected.

2. Preclearance Does Not Bar Section 2 Review.

As its second question, the state asks whether preclearance establishes "prima facie validity" of a redistricting plan and thus precludes interim relief under section 2 of the Voting Rights Act. Jurisdictional Statement at i. The answer is plain – it does not.

Section 5 of the Voting Rights Act was "designed by Congress to banish the blight of racial discrimination in voting . . . . " *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). It conditions enforcement of voting changes by specified political subdivisions upon satisfactory review by the federal administration or judiciary. *United Jewish Organizations v. Carey*, 430 U.S. 144, 157 (1977). The statute expressly states that preclearance of a change does not "bar a subsequent action to enjoin enforcement of such [change]." 42 U.S.C. §1973c. Because of this language, courts have held that preclearance prevents neither a section 2 challenge by private plaintiffs, *Major v. Treen*, 574 F. Supp. 325, 327 n.1 (E.D. La. 1983), nor a subsequent enforcement action by the Department of Justice. *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56, 59 n.1 (5th Cir. 1979); *see also Morris v. Gressette*, 432 U.S. 491, 507 (1977). Given the different standards of proof under section 2 and section 5, preclearance creates no favorable presumption for the submitting jurisdiction: in fact, the legislative purpose behind preclearance is to require certain jurisdictions to overcome the historical presumption that their voting changes may attempt or result in discrimination against minority voters. *See City of Rome v. United States*, 446 U.S. 156, 182 (1980).

Moreover, the state's argument would deprive minority voters of the benefits of section 2 in states covered by section 5. Preclearance is required primarily in those states where racial and ethnic discrimination is an historical fact. Because of their past practices, these states must convince the Department of Justice that a proposed change apparently is not another episode in a history of discrimination. If the state succeeds, private litigants are free to attack the change in an adversary proceeding. Accepting the state's argument that SB1 deserves "the most stringent application of the concept of prima facie validity," Jurisdictional Statement at 16, would place upon the victims of discrimination the burden section 2 was designed to lift. *South Carolina v. Katzenbach,* 383 U. S. at 328 (intent behind section 5 was to remedy the shifting of "the advantage of time and inertia from the perpetrators of the evil to its victims"). Thus, even if SB1 had existed on December 24, was effective under state law, and had been precleared by the Justice Department, preclearance would not have shielded it from section 2 scrutiny.

In any case, the state's argument fails because it is based on the flawed assumption that SB1 was precleared before the lower court adopted its interim plan. In fact, SB1 was not enacted until after the court-ordered interim plans were adopted and it never has been precleared. The court below never was required to consider whether to defer to a precleared legislative plan. Any contention that section 5 preclearance creates a presumption of section 2 validity therefore is irrelevant. The state's claim that SB1 has been precleared and is entitled to a presumption of validity, like its claim that the court's interim senate plan

displaced SB1, simply ignores the facts and the law. The state's complaints concerning the lower court's determination that SB1 violates section 2 also are without merit. This finding was made when the court denied the state's motion seeking a stay of the interim senate plan pending preclearance of SB1 and a trial on its legality.

In sum, the only two questions raised by the state as grounds for summary reversal of the interim senate plan assume that SB1 was a valid and enforceable precleared plan between December 24, 1991, and January 10, 1992. The state's arguments stand or fall according to the degree to which the court was required to defer to such a plan. However, a precleared SB1 is a figment of the state's manipulation of the facts. During trial, the *Quiroz* Plan – like Appellees' proposed senate plan – was merely an option offered to the court in fashioning interim relief; SB1 did not exist at all. The court chose to reject the *Quiroz* Plan that became SB1; it rejected Appellees' proposal as well. After passage, SB1 became simply an unprecleared plan yet to be effective under state law. On January 10, there was nothing to which to defer. The lower court's failure to defer to nothing is not error.

B. THE DECISIONS BELOW ARE CORRECT.

The state restricts its grounds for summary reversal to issues dependent upon the alleged preclearance of SB1. It therefore has limited itself to these issues on appeal. Sup. Ct. R. 14.1(a), 18.3. Appellees' motion to affirm, however, is not limited only to rejection of these issues, Sup. Ct. R. 18.6, and Appellees assert that lower court's judgment should be affirmed for the reasons set forth below.

1. The Population Deviation Under The Interim Senate Plan Was Proper.

The Jurisdictional Statement implies that the lower court erred by crafting an interim plan that contained a 9.98% population deviation. This complaint ignores the fact that the plan is an interim plan, and thus is held to a less stringent standard than is applied to final court-ordered plans. *Compare Connor v. Finch*, 431 U.S. 407, 418 (1977) (deviation of over 16% not *de minimis* in final plan) *with Mahan v. Howell*, 410 U.S. 315, 332 (1973) (deviation of 10% permissible in interim plan). Only four months ago, this Court affirmed an interim redistricting plan whose population deviation was eleven times greater than that found in the lower court's senate plan. *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991). *aff'd in part and vacated in part*, ___ U.S. ___, 112 S. Ct. 412 (1992). In *Watkins*, the court was left with less time to create a remedy than was available to the lower court in the case at bar; accordingly, rather than craft its own plan, the court ordered on an interim basis the continued use of the 1982 lines. 771 F. Supp. at 807. Although the court recognized that the maximum population deviation between districts in the 1982 plan – over 110% – exceeded the benchmarks for both court-ordered and legislative plans, it determined that its "concerns about the otherwise unacceptable population deviations in certain districts under the 1982 plan are far outweighed by the benefits to the voters in these elections." *Id.* at 804. Reaffirming that "[e]lections are for the voters," the court explained its decision:

> Although the deviation levels using existing districts would certainly be unconstitutional if

> this court were adopting a permanent reapportionment plan, we hold that elections may be constitutionally held using current districts *on an interim basis*. . . . We conclude . . . that the priority of holding elections on a timely basis warrants a temporary departure from the one-person, one-vote principle, pending adoption of a permanent reapportionment plan by either the Legislature or this court.

Id. (emphasis in original). While the summary affirmance of this portion of the decision does not define this Court's opinion, *Fusari v. Steinberg*, 419 U.S. 379, 391-392 n. (1975) (Burger, C.J., concurring), it does indicate the application of established principles. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

The state also ignores the focus and effect of the underpopulation in the interim plan. During the trial that resulted in the interim plan, the state introduced the testimony of an attorney who represented the plaintiffs in the *Quiroz* settlement who defended the underpopulation of minority districts created in the *Quiroz* Plan:

> If you draw districts that are precisely equal in population pursuant to the unadjusted census count, then those districts are actually overpopulated and packed with minority population. We felt that it was essential, therefore, that minority districts be drawn below ideal population. . . .

Statement of Facts, Hearing on Plaintiffs' Request for Preliminary Injunction and Implementation of Interim Plan, December 13, 1991, at 229-230. The lower court plainly showed concern over the alleged minority undercount. In its interim senate plan, most of the minority

districts are underpopulated to accommodate for the undercount: seven of the plan's ten districts in which minorities constitute the population majority are underpopulated by an average of 8,948 persons. Two of the other three districts are of ideal district size: only District 19 is overpopulated (by 234 persons, a .00043 deviation). Overall, the plan's average underpopulation of the ten minority districts is 6,264, while the average overpopulation of Anglo majority districts is 4,288.

The lower court's effort to protect minority voting rights contrasts sharply with the state's dilatory and self-interested practices. It was only because of the excessive delay in submitting the first legislative senate plan to the Department of Justice that the so-called emergency necessitating the *Quiroz* settlement arose. In turn, the illegal formulation of that plan led to its vacatur by the Texas Supreme Court two weeks before the candidate filing deadline. Finally, egregious catering to incumbent Anglo Democrats during the January 1992 special session forced the lower court to issue its January 10 opinion rejecting SB1 as a replacement for the court's interim plan. the delays and gamesmanship that have characterized the state's handling of redistricting have not gone unnoticed. As the Department of Justice wrote in opposing the state's "last minute" effort to stay the lower court's plan over six weeks ago:

> Granting the State's request would likely come at a cost of substantial harm to the public interest. Potential voters may be confused by the continuing uncertainty in district maps and dates for the primary elections. This, in turn,

> may reduce voter turnout. . . . The State asks the Court to impose these costs, and the significant financial burden of a delayed election, upon the Texas citizenry, even though the State's own actions in preparing an electoral plan have largely produced the situation the State now faces.

Memorandum of the United States as Amicus Curiae in Opposition to Application for Stay Pending Appeal, *Richards v. Terrazas*, ___U.S.___, 112 S.Ct. 924 (1992), at 10 (footnote omitted).

2. The Interim Senate Plan Improves Minority Voting Rights In Comparison To The Quiroz Plan.

Despite its self-professed concern for the voting rights of minorities, the state does not scruple to compare the lower court's interim senate plan with SB1. Moreover. because it declines to acknowledge the existence of the court-ordered benchmark, it is likely to have overlooked its contents. Since the court's interim plan clearly is superior to SB1, the state's failure to compare the plans is understandable. However, while it is not accurate to say that the lower court considered SB1 before issuing its decision, it did consider the *Quiroz* Plan, SB1's illegal predecessor. In its interim plan, the court successfully improved upon the state's proposal.

The lower court's interim plan contains ten districts with a total minority population over 54%, while SB1 contains only nine districts with a total minority population over 46%. More significantly, the court's interim plan

contains nine districts with a minority voting age population ("VAP") in excess of 60%. This improves upon SB1, which contains only eight districts with a minority VAP in excess of 60%. Further, the interim plan contains ten districts with a minority VAP in excess of 48%. SB1, on the other hand, contains only nine districts with a minority VAP in excess of 48%.

Given the interim plan as a benchmark, it is clear that implementation of SB1 would result in a retrogression of minority voting strength. At least one of SB1's so-called minority districts (District 20) has a minority VAP under 60%. In addition, elections under SB1 would deny minority voters in Dallas/Fort Worth the electoral opportunity they have under the court's interim plan, which draws District 12 as a minority impact district with a total minority population of 54.1% and a minority VAP of 48.5%. SB1 has no impact districts: a gap of 18.2% separates the minority VAP of its smallest minority district (District 20 – minority VAP 59.8%) and the next largest district in minority population (District 15 – minority VAP 41.6%). Thus, minority voters have at best a chance of electing eight or nine candidates of their choice under SB1. Under the lower court's plan, it is virtually certain nine minority candidates will be elected, and very possible that ten such candidates will prevail.

Although the issue before this Court is not whether to preclear SB1, the marked distinctions between the plans are important. The state asks this Court to overturn the interim plan, and to order it replaced by SB1 (despite its lack of preclearance). Since the interim plan issued from the lower court's equitable jurisdiction, *see Wise v. Lipscomb*, 437 U.S. at 540; *Mahan v. Howell*, 410 U.S. at 332,

fairness is a legitimate consideration. Both legally and factually, the lower court acted to help those voters ignored by the state's politicking. The state's effort to characterize the issue as one of federal/state relations is a patent attempt to obscure the question of fairness.

CONCLUSION

Neither of the questions raised by the state is substantial. This largely is because the questions rest on premises that are incorrect. The lower court did not act under section 5 to replace a preclared legislative plan. This Court therefore need not consider whether it could have taken such an action. Similarly, this Court need not consider whether preclearence of a legislative plan raises a presumption of validity that bars interim relief. No precleared plan existed, and there thus was nothing from which such a presumption could have arisen. The lower court's judgments therefore should be affirmed.

For the foregoing reasons, Appellees respectfully request that Court summarily affirm the decisions of the district court below.

Respectfully submitted,

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March 1992

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOUIS TERRAZAS, et al., Plaintiffs	§	
AND	§	CIVIL ACTION NO. A-91-CA-426
ROBERT A. ESTRADA, et al., Plaintiffs/ Intervenors,	§	(Filed Nov. 27, 1991)
VS.	§	
BOB SLAGLE, et al., Defendants.	§	

APPLICATION FOR PRELIMINARY INJUNCTION, REQUEST FOR IMPLEMENTATION OF INTERIM PLAN, AND REQUEST FOR CONSOLIDATED HEARING

Plaintiffs Louis Terrazas, Ernest Angelo, Jr., and Tom Craddick, and Plaintiff/Intervenors Robert A. Estrada and Sim D. Stokes III, (collectively, "Plaintiffs"), file this application for preliminary injunction against Defendants Ann W. Richards, Dan Morales, and John Hannah, Jr., ("State Defendants"), this request for the implementation of an alternate redistricting plan for the 1992 election for the Texas Senate, and this request for hearing on such matters on December 10, 1991.

I.

Preliminary Statement

Plaintiffs seek three things by this motion: (1) an injunction against the conduct of elections under the illegal senate redistricting plan fashioned by the States Defendants (the "Quiroz Plan"); (2) an order implementing Plaintiffs' senate plan on an interim basis; and (3) an order scheduling hearing of the first two matters on December 10, 1991. As set forth below, an injunction should be issued because the Quiroz Plan was created illegally and also violates the United States Constitution and the Voting Rights Act. To replace the Quiroz Plan on an interim basis, Plaintiffs' redistricting plan should be adopted because it does not suffer from the legal and practical flaws of the Quiroz Plan. Finally, these matters should be heard on December 10, 1991, the date now set for hearing on Plaintiffs' request for interim relief in the action concerning redistricting of the Texas House.

II.

Legal and Factual Background

On November 18, 1991, the United States Attorney General precleared the plan purportedly fashioned by an agreed judgment signed by a state district judge as a replacement for the redistricting plan passed by the Texas Legislature for the Texas Senate ("Quiroz Plan"). While the Attorney General reserved his right to reconsider the preclearance decision until January 14, 1992, no court order or statute now prevents implementation of this illegal plan by the State Defendants.

Nevertheless, the Attorney General's decision was based on the limited criteria his office is required to evaluate under section 5 of the Voting Rights Act. The Justice Department did not, and legally could not, pass upon the serious state law issues raised by Plaintiffs concerning the method by which the Quiroz Plan was forced upon the citizens of Texas. Similarly, the Justice Department did not evaluate – and gave no opinion on – the validity of the "extraordinarily convoluted" districts created by the Quiroz Plan. Moreover, the department did not review this plan in the light of political gerrymandering claims. Far from disposing of the Plaintiffs' claims, preclearance removes a procedural obstacle the State Defendants have used as a defense to consideration of the Plaintiffs' challenges. As the Plaintiffs can prove, the Quiroz Plan dilutes minority voting rights, shuts Republicans out of the political process, and violates rights guaranteed by the Voting Rights Act and the Constitution.

The imminent deadlines for the upcoming senatorial election require that immediate action be taken to stop the violations the Quiroz Plan will cause. Other intervenors already have sought to enjoin the plan, and have requested implementation of the law originally passed by the Texas legislature ("SB 31"). While disagreeing as to the remedy, Plaintiffs concur with these parties regarding the dangers of the Quiroz Plan and the need to prevent its implementation. Plaintiffs therefore ask that Defendants be preliminarily enjoined from conducting elections or taking any steps to conduct elections under the Quiroz Plan.

Plaintiffs also propose interim implementation of their alternate senate plan, which was submitted to this

Court on November 4, 1991, designated as S562. This plan creates an additional minority impact district, alleviating the dilution caused by the Quiroz Plan. In addition, Plaintiffs' plan creates districts having absolute population equality: i.e., the deviation of each of S562's districts from ideal district size is 0%. This is a significant improvement over the 9.99% total deviation resulting from the forced design of the Quiroz Plan. Moreover, S562 creates fewer administrative problems than does the collusive judgment plan, as it cuts across 199 fewer VTD's than were split by the private parties who are attempting to foist their political deal upon Texas. Lastly, the districts created by S562 are more compact and contiguous than those created in an effort to appease political pressure groups. S562 therefore should be adopted on an interim basis as the redistricting plan for the Texas Senate.

Plaintiffs also request that their application and request for interim application be heard on December 10, 1991, the date of the scheduled hearing on their request for interim implementation of their proposed alternate plan for the Texas House.

III.

Application for Preliminary Injunction

A. The Quiroz Plan Should Be Enjoined Because It Violates State Law.

Plaintiffs reurge their arguments in support of their initial request for injunctive relief against the illegally adopted Quiroz Plan, which was filed in October. Plaintiffs again request that this Court stop the State Defendants in their attempt to deprive Plaintiffs – and all Texas

voters – of the right to participate in the redistricting process through their elected representatives. The facts and the law supporting the federal and state claims raised by Plaintiffs were set forth in Plaintiffs' original application for injunction and in their reply to the State Defendants' response thereto, and were presented to the Court in oral argument on October 23, 1991. For the purposes of this application, Plaintiffs incorporate herein by reference the grounds for relief and authorities cited in their injunction application and reply in connection with the injunction hearing conducted by the Court on October 23, 1991.

B. The Quiroz Plan Should Be Enjoined Because It Violates Federal Law.

In addition to the procedural defects of the Quiroz Plan that are the subject of the October injunction request, Plaintiffs assert that the plan substantively violates the Voting Rights Act and the Constitution. Due to these statutory and constitutional violations, Plaintiffs request injunctive relief similar to that sought in their earlier pleadings.

C. Plaintiffs Can Establish The Elements of Injunctive Relief.

The issuance of a preliminary injunction against the implementation of the Quiroz Plan pending trial is necessary for the following reasons: (a) Plaintiffs are likely to succeed on the merits of their claim that the plan violates the Voting Rights Act and the Constitution; (b) unless

stopped, implementation of the Quiroz Plan in the 1992 senatorial election will result in irreparable harm to Plaintiffs and all minority and Republican voters in Texas; (c) the balance of harm favors issuance of an injunction, in that no harm will result to the state if its officers are prohibited from conducting an election under an illegal redistricting plan; and (d) public policy will not be disserved by the prevention of an election that is likely to result in underrepresentation of minority and Republican voters.

Plaintiffs are likely to succeed on their claims that the districts created by the Quiroz Plan violate the protections afforded to racial and language minorities by the Voting Rights Act and the one person/one vote guarantees of the Fourteenth and Fifteenth Amendments of the Constitution. In concocting the Quiroz Plan, the State Defendants intended to discriminate against Republican voters by concentrating their populations into "safe" districts where their votes would be consistently degraded, causing a significant underrepresentation of Republicans in the Texas Senate and resulting in an overall lack of political power. In the case of minorities, these defendants sought to protect incumbents in most areas of the state, resulting in improper fragmentation and concentration of minority populations.

Implementation of the Quiroz Plan would cause irreparable harm to minority and Republican voters. If the 1992 election goes forward under that scheme, the votes of these statewide minorities (which constitute the majority in a number of compact and contiguous areas) would be consistently degraded, and their participation in the political process would be significantly diminished.

No real and legitimate harm can come to the State Defendants if they are enjoined from using the Quiroz Plan in the 1992 senatorial election. These defendants – state officials charged with the responsibility of execution and not the creation of laws – have no recognizable right either to implement their own private plan or to degrade the electoral rights of minority and Republican voters.

Public policy is best served by compliance with the aims of the Voting Rights Act, the United States Constitution, and Texas law. These documents – more than any *ultra vires* bargain struck behind closed doors – reflect the will of the voters regarding the role they are to play in a representative government. Conversely, no public policy supports stripping away the voters' right to participate in the redistricting process through the illegal interference by the state's executive branch. Public policy plainly will not be disserved if the requested injunction issues.

IV.

Request for Implementation of Interim Plan

A. Standards for Implementation.

Because the Quiroz Plan violates the Voting Rights Act, the Constitution, and Texas law, and because the scheduled Senate election is fast approaching, Texas voters need a new, legal plan that establishes the constituencies and residences of their senators. This Court has the equitable power to implement such a redistricting plan on an interim basis. *See Chapman v. Meier*, 420 U.S. 1, 26 (1975).

In adopting an interim plan, this Court has several options. First, it can implement a plan proposed by one of the parties in the action. *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978). In addition, it can adopt portions of proposed plans to create a composite. *Terrazas v. Clements*, 537 F. Supp. 514, 540 (N.D. Tex. 1982). If adopted on an interim basis, a court-ordered plan constitutes an equitable decree, and is not covered by the preclearance requirements of section 5. *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981).

B. S562 Should Be Adopted.

The reasons for adoption of Plaintiffs' alternate S562 are discussed more fully in the submission of proposals filed on November 4. In short, the reasons for implementation of this plan are three-fold. First, S562 creates an additional district in which the population of minority voters can have a significant impact upon elections: while both the Quiroz Plan and S562 create nine majority (>65%) minority districts, this additional impact (>50%) district increases the likelihood that minorities will be able to elect a representative of their choice. S562 is able to draw this additional minority impact district because it does not sacrifice minority rights for the sake of Anglo incumbents, one of the obvious and intended results of the Quiroz Plan. Second, S562 has a total population deviation of 0%, meaning that each district under the plan contains exactly the same number of residents as every other district. Under the Quiroz Plan, by contrast, the total population deviation is 9.99%, slimly satisfying the letter, if not the spirit, of the 10% benchmark used to

determine whether state legislative redistricting satisfies the one person/one vote requirement of the Constitution. *See Brown v. Thompson*, 462 U.S. 835, 842 (1983). The impact of this difference in population is significant: while all of S562's districts have the same number of residents, the difference between the largest (Dist. 7) and smallest (Dist. 21) districts under the Quiroz Plan is over 54,700 citizens, the largest disparity in Texas since the passage of the Voting Rights Act. Lastly, S562 the cuts across only 129 VTD's, whereas the Quiroz Plan splits 328, indicating that the Plaintiffs' districts are superior in geographical as well as populational compactness.

V.

Request for Consolidated Hearing

Plaintiffs' request for interim implementation of their proposed alternate plan for the Texas House of Representatives has been set for hearing at 9:00 a.m. on December 10, 1991. Many of the legal and evidentiary issues that are raised by this request are relevant in the consideration of the requested injunction and interim plan implementation concerning the Senate election. In the interest of judicial economy, Plaintiffs therefore ask that the foregoing requests be heard on December 10.

VI.

Conclusion and Prayer

If Texas is to conduct a fair and constitutional election for the members of its senate, the Quiroz Plan must be stopped quickly and replaced with a valid substitute.

Because of the state's delays, less than a week remains before the opening of the candidate filing period. It is clear that the current plan sacrifices the rights of minority voters in order to protect Anglo incumbents, and that the state's effort at a plan falls far short of offering minority voters a fair opportunity to elect representatives of their choice. In the case of Republicans, it is even clearer that the State Defendants went out of their way to preserve and even to enhance the disproportionate power their party has in state government. For these reasons, and for the reasons grounded in the due process and equal protection clauses and state law presented in Plaintiffs' earlier request for injunctive relief, the state's further implementation of the Quiroz Plan should be enjoined.

The best available alternate plan before the Court is S562. It is complete and ready for implementation. While other intervenors have suggested that the Court revive the defunct legislative plan, SB 31, Plaintiffs have demonstrated in their specific pleadings filed November 4, 1991, that this plan succumbs to most if not all of the Voting Rights Act and constitutional defects that characterize the Quiroz Plan. Outside of these plans, the only alternative is an entirely new court plan. Given the availability of S562, undertaking that vast project is unnecessary.

WHEREFORE, Plaintiffs request that this Court: (1) enjoin the State Defendants from conducting or preparing for elections under the Quiroz Plan pending trial hereof; (2) adopt S562 on an interim basis and order the state to prepare for and conduct the upcoming elections for the Texas Senate pursuant to this interim plan; and (3) grant

Plaintiffs any and all other relief, legal or equitable, to which they are entitled.

Respectfully submitted,

/s/ John N. McCamish, Jr.
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument has been served by certified mail, return receipt requested, on this 27th day of November, 1991, upon:

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/s/ Jonathan David Pauerstein
by Kevin M. Warburton
Jonathan David Pauerstein

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOUIS TERRAZAS, et al.,	§	
Plaintiffs	§	
AND	§	
ROBERT A. ESTRADA, et al.,	§	
Plaintiffs/ Intervenors,	§	CIVIL ACTION
	§	NO. A-91-CA-426
VS.	§	
BOB SLAGLE, et al.,	§	
Defendants.	§	

ORDER SETTING HEARING DATE

On this day the Court considered the Plaintiffs request for hearing on their application for preliminary injunction against State Defendants Ann W. Richards, Dan Morales, and John Hannah, Jr. ("State Defendants"), and their request for implementation of interim plan affecting the upcoming election for members of the Texas Senate. After considering said request, the Court issues the following order:

IT IS ORDERED that the Plaintiffs' application for injunction against the State Defendants and their request for interim implementation of their proposed alternate plan for the Senate shall be heard before the three-judge panel in the courtroom of the United States District Court for the Western District of Texas in Austin, Texas, on December 10, 1991, at 9:00 a.m. in conjunction with the hearing on Plaintiffs' request for interim implementation

of their proposed alternate for the Texas House of Representatives.

SIGNED AND ORDERED ENTERED this date: ___.

COPY FOR YOUR INFORMATION
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX B

U.S. Department of Justice

Civil Rights Division

[SEAL]

Office of the Assistant Attorney General
Washington, D.C. 20035

January 4, 1992

John N. McCamish, Jr., Esq.
McCamish, Martin & Loeffler
1200 Republic of Texas Plaza
175 E. Houston
San Antonio, Texas 78299-2999

Dear Mr. McCamish:

I write in response to your letter dated January 3, 1992 regarding the so-called "*Quiroz* Senate plan." Your letter requests that the Attorney General vacate and withdraw the November 18, 1991, preclearance of the *Quiroz* Senate plan for numerous reasons including allegations that it violates the Voting Rights Act. Your letter also indicates that certain members of the Texas Legislature are currently stating in an ongoing debate that passage of a plan similar or identical to the *Quiroz* Senate plan is " 'preapproved' by Justice." You expressed the urgency for an immediate response. Let me respond to both those issues.

First, as you know, the Attorney General specifically reserved the right set forth in Section 5 of the Voting Rights Act and 28 C.F.R. 51.43 to reexamine the submission during the remainder of the 60-day review period. In this case, that period will not expire until January 14,

1992 since the State did not complete its submission until November 15, 1991. *See* 28 C.F.R. 51.39. We are carefully considering all the relevant information presented. In addition, we are cognizant of the decisions of the Texas Supreme Court and the three-judge federal court in *Terrazas v. Slagle*, Nos. 91-CA-425, 426, 428 (W.D. Tex.). Together, those decisions suggest that the *Quiroz* Senate plan submitted to the Attorney General may have been a premature submission not entitled to any determination on the merits. See 28 C.F.R. 51.22, 51.35. In light of the *Terrazas* court's order and the special session of the Texas Legislature, however, it does not appear that Texas intends, or has the legal ability, to implement the *Quiroz* Senate plan. We will continue to monitor developments and take such action regarding the *Quiroz* Senate plan as the Attorney General determines is appropriate.

Second, I am most concerned about the suggestion that any plan has been "preapproved" by the Attorney General. There is simply no such thing as a "preapproved plan." Any plan enacted by the Texas Legislature requires submission under Section 5 of the Voting Rights Act. Review will then take place based upon all information available to the Attorney General at that time. Clearly, there have been significant new developments and submission of new information regarding the *Quiroz* Senate plan since our letter of November 18, 1991. All of that would have to be considered even if the Legislature passed a plan identical to the *Quiroz* Senate plan. Review of any plan hereafter passed by the Legislature, even the *Quiroz* Senate plan, would be a *de novo* review at that time. The fact that we interposed no objection to the *Quiroz* Senate plan in an earlier context would have no

legal relevance to our review of a later enactment, even of a plan containing the same districts.

In addition, analysis of any plan passed by the Special Session of the Texas Legislature requires comparison of that plan to the plan ordered into effect by the *Terrazas* court. In particular, we would have to identify whether any portions of the enacted plan failed to provide minority voters with the same opportunity to elect candidates of their choice that they have under the court-ordered plan and, if so, the reason(s) for altering or rejecting those portions of the court-ordered plan. In addition, we would have to determine whether the court-ordered plan is the appropriate benchmark for consideration of any subsequently enacted plan. See 28 C.F.R. 51.54(b). If so, our conclusion of whether the enacted plan has a discriminatory effect for purposes of Section 5 of the Voting Rights Act, *see* 28 C.F.R. 51.54(a), might well be different than that reached on an identical plan judged against a different benchmark.

Thank you for bringing these matters to my attention. You can be sure that the Attorney General will continue to monitor this situation and take such action as is deemed appropriate.

Sincerely,

/s/ John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Hon. John Hannah, Jr.
Secretary of State

Hon. Dan Morales
Attorney General

Mr. Bob Kelly
Executive Director,
Legislative Council

Hon. Bob Bullock
Lt. Governor

Hon. Gib Lewis
Speaker of the House

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS v. UNITED STATES OF AMERICA	Civil Action No. 91-2383 (PMW, U.S.C.A., JHG, SS) (Filed Feb. 25, 1992)

MEMORANDUM ORDER

On February 5, 1992, plaintiff filed its Motion for Partial Summary Judgment (and for Oral Hearing and Expedited Consideration) with Supporting Legal Memorandum. On February 6, 1992, the court ordered defendant to submit a memorandum in response to plaintiff's motion. Defendant filed its Memorandum in Opposition to State of Texas' Motion for Partial Summary Judgment on February 13, 1992. Plaintiff filed a memorandum in reply on February 19, 1992.

Oral argument on plaintiff's motion was held on February 21, 1992 before the district court comprised of three judges in accordance with 28 U.S.C. § 2284 and 42 U.S.C. § 1973c. At the conclusion of oral argument, the matter was deemed submitted.

I. BACKGROUND

On September 20, 1991, the State of Texas filed its complaint seeking relief under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1988) ("section 5").

Specifically, the State sought preclearance of its redistricting plans that had been passed by the legislature during the summer of 1991. Although four plans – governing elections to the Texas House, Texas Senate, Texas Board of Education, and United States Congress – were originally the subject of this suit for declaratory judgment under section 5, only one of these – the Texas Senate plan – remains at issue.

Prior to the filing of this suit in September 1991, the State submitted its original Texas Senate plan – S.B. 31 – to the Attorney General of the United States under the alternative preclearance procedures provided under section 5. According to the statute, the Attorney General had 60 days to object to any part of the proposed plan; if no objection were filed after 60 days, the plan would be precleared and the State would be free to begin implementing it. On the 59th day – October 7, 1991 – the State notified the Attorney General that it was withdrawing S.B. 31 from consideration and submitting a different plan in its place.

The new plan submitted on October 8, 1991 was the result of a settlement signed the previous day between the Texas Attorney General and private plaintiffs in a state court proceeding challenging the S.B. 31 plan. *Quiroz v. Richards*, C.A. No. C-4395-91-F (332d Jud. Dist., Hidalgo County). This same settlement was entered three days later in a parallel state court action. *Mena v. Richards*, C.A. No. C-454-91-F (332d Jud. Dist., Hidalgo County). The so-called "*Quiroz/Mena* settlement plan" governing elections to the Texas Senate was precleared by the Attorney General on November 18, 1991.

On December 17, 1991, the settlement reached in both *Quiroz* and *Mena* was invalidated by the Texas Supreme Court on the grounds that the trial judge abused his discretion in accepting the settlement without first conducting an adversary proceeding. The State thereafter refrained from further implementation of the *Quiroz/Mena* settlement plan.

On December 24, 1991, a three-judge federal court in the Western District of Texas – which had been convened to consider various constitutional and statutory challenges to the plans passed by the Texas legislature in the summer of 1991 – entered judgment "to provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law." *Terrazas v. Slagle*, Civil Nos. A-91-CA-425, -426, -428, Summary Opinion and Judgment at 23 (W.D. Tex. Dec. 24, 1991). The court ordered primary elections for the Texas Senate to be conducted pursuant to its own interim plan which it attached as an appendix to its ruling. This is the so-called *Terrazas* plan.

Meanwhile, the Governor called the Texas legislature into special session to cure the procedural deficiencies of the *Quiroz/Mena* settlement plan by means of legislative enactment. On January 8, 1992, the legislature adopted a new senate plan ("S.B. 1"), and the Governor signed it into law. it is undisputed that S.B. 1 is substantively identical to the *Quiroz/Mena* settlement plan that the Attorney General had precleared in November 1991.

On January 9, 1992, the State filed a motion in the *Terrazas* court to vacate the December 24, 1991 order and

to order, instead, the implementation of the newly ratified S.B. 1. On January 10, the court denied the motion, finding that S.B. 1 "fail[ed] to satisfy the Sec. 2 requirements of the Voting Rights Act." *Terrazas v. Slagle*, Civil Nos. A-91-CA-425, -426, Order and Judgment at 12-13 (W.D. Tex. Jan. 10, 1992). The state sought a stay of the December 24, 1991 order pending appeal, but the Supreme Court denied the stay on January 16, 1992. *See Richards v. Terrazas*, 112 S. Ct. 924 (1992). The state has appealed both the December 24, 1991 and the January 10, 1991 orders to the Supreme Court, *Richards v. Terrazas*, 60 U.S.L.W. 3554 (U.S. Feb. 18, 1991), and the case is currently pending. *See Id.* at 3560 (questions presented).

On January 10, 1992, the State submitted S.B. 1 to the Attorney General for precleraance under section 5. The Attorney General's deadline for objecting to the proposed plan in March 9, 1992. Under the *Terrazas* plan, the primary election for the Texas Senate is scheduled for March 10, 1992. The candidate qualification period was closed on January 10, 1992, and the "early voting" procedure commenced on February 19, 1992.

II. DISCUSSION

Under section 5 of the Voting Rights Act, no person may be deprived of a right to vote for failing to comply with a new enactment affecting voting procedure unless the new enactment has been precleared. The jurisdiction covered by the Voting Rights Act has two options: It may submit the proposed procedure to the Attorney General, who may prevent preclearance only by objecting to the proposal within 60 days, or it may seek a declaratory

judgment in the U.S. District Court for the District of Columbia that the new enactment "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1988).

Plaintiff's burden in a suit for declaratory judgment under section 5 is twofold: First, it must demonstrate that the redistricting plan does not lead to a retrogression in the position of racial minorities, *see Beer v. United States*, 425 U.S. 130, 141 (1976); second, the State must demonstrate that the plan is free of a discriminatory purpose. *Richmond v. United States*, 422 U.S. 358, 362 (1975); *Busbee v. Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983). Even if a change is "ameliorative," it may violate section 5 if it "so discriminates on the basis of race or color as to violate the Constitution." *Beer*, 425 U.S. at 141.

In its motion for partial summary judgment, the State makes three arguments: First, it argues that there is no longer a live controversy between the parties because S.B. 1 has already been precleared (in the guise of the *Quiroz/Mena* settlement plan), so there is nothing for this court to do but to declare that the plan is already precleared. Second, the State argues alternatively that this court should exercise its authority under section 5 and preclear S.B. 1 because, as a matter of law, it cannot be retrogressive when compared to the benchmark plan – the *Quiroz/Mena* settlement plan – to which it is identical. Finally, the State argues that S.B. 1 is not subject to preclearance because it is not a change in voting procedures, for the only difference between it and the earlier precleared

Quiroz/Mena settlement plan is in the manner in which the State adopted the plan.

A. Has S.B. 1 Already Been Precleared?

The Attorney General precleared the *Quiroz/Mena* settlement plan in November 1991. Section 5 is concerned about *changes* in voting procedures that have the purpose or effect of diluting or abridging the right to vote on account of race. *Beer v. United States*, 425 U.S. 130, 141 (1976). The fact that the Attorney General implicitly concluded in November 1991 (by not objecting to the proposal) that the *Quiroz/Mena* settlement plan was not a change in voting procedures that diluted or abridged minority voting rights tells us only that, when compared with the existing plan in place in November 1991, the *Quiroz/Mena* settlement plan was not considered to be retrogressive. But whether S.B. 1 is retrogressive as of the moment it was submitted to the Attorney General on January 10, 1992 is a different question.

Preclearance involves a comparative inquiry into whether the change in voting procedures is retrogressive when compared with the plan that would otherwise be in force and effect. *See Perkins v. Matthews*, 400 U.S. 379, 394 (1971); *see also City of Lochart v. United States*, 460 U.S. 125, 132-33 (1983) (proper comparison is between new system and system actually in effect prior to adoption of new charter, regardless of what state law might have required). In this case, the plan in effect since December 24, 1991 has been the interim court-ordered *Terrazas* plan. When preclearing the *Quiroz/Mena* settlement plan in November 1991, the Attorney General did not compare it

with the *Terrazas* plan, which did not yet exist, but rather to the plan otherwise in effect, which was the plan governing elections to the Texas Senate prior to the 1990 census. The retrogression inquiry may be different in light of the intervening imposition of the *Terrazas* plan. We are thus unable to agree with the State that S.B. 1 has already been precleared.[1]

B. Can S.B. 1 Be Precleared as a Matter of Law?

If we were to determine that the benchmark against which S.B. 1 is to be compared is the *Quiroz/Mena* settlement plan, then the fact that the two plans are identical would compel us to conclude, as a matter of law, that S.B. 1 is not retrogressive under *Beer*. But that would not be the end of the preclearance inquiry. This court would have to inquire into the second test under section 5 – whether a racially discriminatory purpose was among the factors that motivated the State in devising S.B. 1. In order for this court to preclear S.B. 1 under section 5, we would have to engage in an independent inquiry into its constitutionality. The purposes motivating the *Quiroz/*

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[1] We are not unmindful of the considerable controversy surrounding the adoption of the *Terrazas* plan. *See, e.g.*, Roberto Suro, *Texas Remapping Battle Heats Up, Threatening to Singe the Democrats*, N.Y. TIMES, Jan. 26, 1992, at 14; Sam Attlesey, *Morales Investigates Call Between Lawmaker, Judge*, DALLAS MORNING NEWS, Feb. 1, 1992, at 1A. Nevertheless, issues concerning how or why the *Terrazas* plan was adopted must be separated from the substantive merits of the plan itself. In order for S.B. 1 to be precleared, it must not have the effect of abridging minority voting rights when compared to the *Terrazas* plan.

Mena settlement plan are different from those motivating S.B. 1. Any determination of whether S.B. 1 has a discriminatory purpose would require us to conduct some kind of hearing. In any event, it is not an issue that can be resolved on summary judgment.[2]

The Department of Justice argues that the *Terrazas* plan must be deemed the proper benchmark plan for section 5 preclearance purposes. Unless and until it is held to be unconstitutional or otherwise invalid under section 2 of the Voting Rights Act, it is, in fact, the only plan in effect. It would appear that, at the very least, this court must conduct an evidentiary hearing to determine whether S.B. 1 is retrogressive with respect to the *Terrazas* plan. "A section 5 declaratory judgment should be denied when the electoral plan under review is retrogressive in comparison to a court-ordered plan that will be implemented absent approval of the statutory plan." *Mississippi v. Smith*, 541 F. Supp. 1329, 1333 (D.D.C. 1982), *appeal dismissed*, 461 U.S. 912 (1983). Inasmuch as a hearing is

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[2] At oral argument on February 21, 1992, counsel from the Department of Justice represented to the court that the Attorney General would most likely interpose an objection to S.B. 1 on the grounds that the *Terrazas* court had found it to be violative of section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988). *See* Transcript of Motion for Partial Summary Judgment (filed Feb. 24, 1992) at 37-38. We therefore have no expectation that S.B. 1 will be precleared as of March 10, 1992, and we anticipate the need for a full evidentiary hearing. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969) ("If the Attorney General objects to the new enactment, the State may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia.").

required, plaintiff cannot now prevail on summary judgment.

Court-ordered plans are generally *not* subject to section 5 preclearance, *see Connor v. Johnson*, 402 U.S. 690, 691 (1971) (per curiam). The only court-ordered plans that *are* subject to preclearance are those that reflect the policy choices of the covered jurisdiction. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981); *Wise v. Lipscomb*, 437 U.S. 535, 548 (1978) (Powell, J., concurring). The record clearly indicates that the court-ordered *Terrazas* plan does *not* represent the policy choices of the State of Texas, so it cannot reasonably be interpreted to be a change in voting procedure submitted by the State. Section 5 does not, therefore, prevent the implementation of the *Terrazas* plan. The fact that the *Terrazas* plan is legally enforceable without section 5 preclearance and that it has, in fact, already been implemented, means that – at least until it is vacated – it is, the only benchmark we have against which to compare any proposed change in voting procedures.[3]

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[3] The Supreme Court has recognized that, although not binding on this court, the Department of Justice's construction of the Voting Rights Act is entitled to considerable deference. *See Presley v. Etowah County Comm'n*, No. 90-711, slip op. at 16 (U.S. Jan. 27, 1992). According to Justice Department regulations, court-ordered plans are subject to preclearance by the Attorney General under section 5 "to the extent that they reflect the policy choices of the submitting authority." 28 C.F.R. § 51.18(a) (1991). If a court-ordered plan for which preclearance under section 5 is necessary (that is, a plan that reflects the policy choices of the submitting authority) has not, in fact, been precleared as required, it cannot serve as a

(Continued on following page)

C. Is S.B. 1 Subject to Preclearance?

While it is true that the principal difference between S.B. 1 and the *Quiroz/Mena* settlement plan is in the procedural mechanism by which they were "enacted" by the State, that is not the only difference between the two plans. They were enacted and submitted for preclearance in different contexts. There is apparently no dispute that S.B. 1 and the *Terrazas* plan differ such that, if the *Terrazas* plan is the benchmark, S.B. 1 represents a change in voting procedure. For this reason, S.B. 1 would be subject to preclearance under section 5.

But even if the *Quiroz/Mena* settlement plan were deemed to be the proper benchmark, S.B. 1 would still be subject to preclearance. While the retrogression analysis would be simple inasmuch as S.B. 1 and the *Quiroz/Mena* settlement plan are substantively identical, the analysis of whether S.B. 1's purpose was discriminatory cannot be resolved simply by recognizing that the *Quiroz/Mena* settlement plan had been precleared. At the very least, S.B. 1 and the *Quiroz/Mena* settlement plan differ in the way they were enacted. We cannot conclude, as a matter of law, that the purposes behind S.B. 1 – passed by the legislature after the December 24, 1991 order in *Terrazas* – were nondiscriminatory simply because the Attorney

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(Continued from previous page)

benchmark for subsequent changes submitted by the jurisdiction. *Id.* § 51.54(b)(3). Nothing in the regulations precludes the use of a court-ordered plan that is not subject to preclearance under section 5 – such as the *Terrazas* plan – as a benchmark for subsequent changes in voting procedures.

General determined that the purposes behind the *Quiroz/ Mena* settlement plan were not discriminatory. We could make that conclusion only after an evidentiary hearing.

III. CONCLUSION

For the reasons discussed above, we cannot conclude that S.B. 1 has already been precleared or that S.B. 1 may be precleared as a matter of law or that S.B. 1 need not be precleared because it is not a change in voting procedures.

Accordingly, it is this 25th day of February, 1992,

ORDERED that Plaintiff's motion for partial summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that a status call to consider a schedule for any further proceedings in the case shall take place on *Wednesday, March 18, 1992 at 4:00 pm* in Courtroom No. 17 at the United States Courthouse, Washington, DC 20002.

/s/ Patricia M. Wald
Patricia M. Wald
United States
Circuit Judge

/s/ Joyce Hens Green
Joyce Hens Green
United States
District Judge

/s/ Stanley Sporkin
Stanley Sporkin
United States
District Judge

MAR 13 1992
OFFICE OF THE CLERK

No. 91-1270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, *et al.*,
Appellants,

vs.

LOUIS TERRAZAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLANTS' SUPPLEMENT TO JURISDICTIONAL STATEMENT AND OPPOSITION TO MOTION TO AFFIRM

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March 13, 1992

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APPELLANTS' SUPPLEMENT TO JURISDICTIONAL STATEMENT AND OPPOSITION TO MOTION TO AFFIRM

Pursuant to the Court's Rules 18.8 and 18.9, the Governor, Attorney General, and Secretary of State of Texas supplement their Jurisdictional Statement and respond in opposition to the appellees' Motion to Affirm:

Recent Events

Two events since the filing of the Jurisdictional Statement further enliven this case and heighten the importance of the questions presented in this appeal. These same events dramatically illustrate the invalidity of the lower court's jurisdictional usurpation of section 5 powers from the administrative and judicial forums -- the Department of Justice ("DOJ") and the United States District Court for the District of Columbia -- assigned section 5 responsibilities by the Voting Rights Act ("Act").

On February 25, 1992, a three-judge panel of the United States District Court for the District of Columbia denied the state's motion for partial summary judgment in the pending section 5 case of *Texas v. United States*, No. 91-2383. *See* Motion to Dismiss, App. C.

On March 9, 1992, DOJ issued a section 5 letter, objecting to S.B. 1, the state's legislatively-enacted Senate redistricting plan. *See* Appendix to this Supplement and Response in Opposition. The only basis for DOJ's objection is the *Terrazas* district court's globally-stated preliminary determination that S.B. 1 violates section 2.[1]

Both the court in *Texas v. United States* and the DOJ in its March 9th letter treat the district court order

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[1] DOJ's rationale is a matter of choice, not compulsion. *See City of Richmond v. United States*, 422 U.S. 358, 373-74 (1975) (DOJ not bound by resolution of section 5 issues in cases to which it was not a party).

challenged in this appeal ("*Terrazas* Senate plan") as altering *for now* the status quo insofar as section 5 review is concerned; both also recognize that subsequent action by this Court may alter the section 5 status quo which must guide them in exercising their jurisdictional responsibilities under the Act.

Relationship between Recent Events and Appellate Issues

The result has been an inversion of the statutory scheme under section 5 of the Act. Instead of the specialized mechanism of review by DOJ and the D.C. district court established in the Act, *McDaniel v. Sanchez*, 452 U.S. 130, 150-51 (1981), the exclusive source of review has become a local three-judge court. It is apparent that both the *Texas v. United States* court and DOJ felt displaced by the unreversed existence of the *Terrazas* Senate plan and that neither was willing to act in anticipation of what this Court might rule on appeal.

The inversion of authority and the resulting paralysis quickens the section 5 jurisdictional issue raised here, investing it with more force and importance. Painted into a corner by the district court's *Terrazas* Senate plan, the specialized section 5 forums in the District of Columbia refuse to exercise the independent judgment which the Act established them to exercise.

This result reveals fundamental confusion and conflict in the federal courts about the proper role of section 5 review. Whereas this Court has repeatedly cautioned that section 5 is not a license to cast aside the policy determinations of covered jurisdictions, even where statutory infirmities are properly found to exist, *see Upham v. Seamon*, 456 U.S. 37 (1982), the use of the *Terrazas* court's unfounded plan serves to preclude all consideration of the policy choices of the state. Both DOJ and the D.C. district court have given to the *Terrazas* plan that binding deference which this Court sought to preserve for the legitimate policy choices of sovereign

states. This circumstance brings this case into square conflict with the recent ruling of the Fifth Circuit which properly refused to allow interim actions by local federal courts to serve as benchmarks that would substitute for the policy choices of covered jurisdictions for purposes of section 5 review. *See White v. City of Belzoni*, 854 F.2d 75, 76 (5th Cir. 1988) (finding no authority for the claim that a court-ordered interim plan "must serve as the benchmark for future plans").

Thus, in a fundamental perversion of the Act's section 5 scheme, the *Terrazas* court, rushing to fill a non-existent vacuum, has constituted itself the only section 5 forum available to the state. It has impermissibly wedged its plan between the previously implemented (that is, benchmark) plan and the state plan precleared on November 18, 1991.[2] This consequence, of course, forms the very basis of the state's appeal and its argument that the challenged district court order must be reversed for lack of jurisdiction.

The perversion of the statutory scheme is evident from the appellees' motion in which the argument is made that S.B. 1 is retrogressive when compared to the *Terrazas* Senate plan. Motion at 21. The determination whether S.B. 1 is retrogressive is statutorily entrusted to one forum and one forum only, that being the reviewing authorities in the District of Columbia. *Hathorn v. Lovorn*, 457 U.S. 255, 267 (1982). Yet, appellees would have this Court engage in this type of comparative review on appeal from a court that was statutorily without authority to

[2] DOJ's preclearance was reconfirmed when January 14, 1992, passed without DOJ reversing its November 18th decision. January 14th -- DOJ's legal deadline for objecting, *see* Motion to Affirm, App. B-1 -- was well *after* the state had begun compulsory implementation of the *Terrazas* plan and five days *after* the state had resubmitted S.B. 1 as a precautionary measure.

engage in any substantive determinations whatever under section 5.

The continued existence of the *Terrazas* Senate plan directly contradicts the combined principles of *Morris v. Gressette*, 432 U.S. 491 (1977), and *City of Lockhart v. United States*, 460 U.S. 129, 132-33 & n.8 (1983). The district court, in ordering implementation of the *Terrazas* Senate plan, used state law to override a DOJ grant of preclearance, an action which *Gressette* and *Lockhart* together forbid; it inverted the bedrock federalism-based principle of legislative deference, *see McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981), by engaging in a remarkably strenuous effort to belittle, instead of deferring to, the state's legislative effort.

It is no surprise that this indiscriminate trampling of governing doctrines of voting rights law has ended with the effective overthrow of section 5's jurisdictional grant to District of Columbia forums. This case has seen the collapse of the entire structure of the Voting Rights Act, the inevitable consequence of the district court's demolition of the Act's foundations. At every turn, the district court avoided the principles of restraint which this Court has used to bound the dangerously amorphous doctrine of vote dilution:

- The district court showed no deference to the state's legislative choices. Disregarding the dictates of *Upham v. Seamon*, *supra*, it honored not a single state policy choice expressed by S.B. 1;

- The district court gave the state legislature no real opportunity to submit a remedial plan and completely ignored the rulings of *Burns v. Richardson*, 384 U.S. 73 (1966), *Wise v. Lipscomb*, 437 U.S. 535 (1978), and *McDaniel v. Sanchez*, *supra*, 452 U.S. at 152 n.34, by disregarding S.B. 1

as a remedial plan because its state law effective date had technically not yet arrived;

- In elbowing aside the state's legislative choices, the district court also elbowed aside the choice -- that is, S.B. 1 -- of those historically representing minority interests in Texas and largely adopted the choice of interests who had no testimony by minority plaintiffs;

- The final irony, this appeal's core, is that the local section 2 forum has become the section 5 forum, while the section 5 forums in D.C. have become section 2 forums.

The recent events only serve to highlight the validity of the state's original position. Things have come full circle. It is critical that the statutory balance be reestablished through restoration to the administrative and judicial forums in the District of Columbia of their section 5 authority -- preempted by the local district court -- to exercise specialized, independent judgment.

CONCLUSION

This appeal is about the importance of jurisdictional bounds on federal courts and this Court's oft-stated requirement that redistricting courts constrained by federalism to defer where possible to state legislative choices. In addition to the relief sought in the Jurisdictional Statement, the Court should grant such other relief as is appropriate, in light of the impending conclusion of the primary runoff elections of April 14, 1992, which are being conducted under the invalid court-ordered interim Senate plan.[3]

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[3] The appeal is not moot. First, it presents an important matter that is capable of repetition yet evading review. *See, e.g., Moore v. Ogilvie*, 394 U.S. 814 (1969) (applying the doctrine in election setting). It is predictable that, in the absence of action by this

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March 13, 1992

Court, the district court will extend its inexplicably-limited preliminary injunction from the primary elections to the general elections; it is just as predictable that, if by then this appeal had been dismissed as moot, the state would promptly return to this Court, raising the same issues, but under the same severe time pressures which have attended this appeal. Second, the recent actions by the D.C. court in *Texas v. United States* and DOJ in its March 9th letter demonstrate that the appealed order has effects stretching beyond the primary, or even general, elections in 1992. These continuing effects, independent of the specific terms and reach of the appealed preliminary injunction, impart a concreteness which brings this appeal within the rule of non-mootness applied in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569-572 (1984), and outside the rule of *University of Texas v. Camenisch*, 451 U.S. 390 (1981). Here, unlike in *Camenisch*, expiration of the preliminary injunction would not restore the state to its pre-injunction status. *See Stotts*, 461 U.S. at 572 n.6.

APPENDIX

March 9, 1992

Honorable John Hannah, Jr.
Secretary of State
P.O. Box 12060
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Dear Mr. Secretary:

This refers to Senate Bill No. 1 (1992), which provides the redistricting plan for the Senate of the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on January 9, 1992; supplemental information was received on January 10, 1992.

We note that the submitted redistricting plan is substantively identical to the plan resulting from the settlement of state court litigation in October 1991. Quiroz v. Richards, No. C-4395-91F (332nd Jud. Dist. Ct., Hidalgo County, Tex.); Mena v. Richards, No. C-454-91-F (332nd Jud. Dist. Ct., Hidalgo County, Tex.). As you know, that plan received Section 5 preclearance on November 18, 1991. Since then, there have been significant new developments and submission of new information regarding that redistricting plan.

In December 1991, the Texas Supreme Court invalidated the settlement, thereby precluding its further implementation. Terrazas v. Ramirez, No. D-1817, 1991 WL 269035 (Tex. Dec. 17, 1991). One week later, the three-judge federal court in Terrazas v. Slagle, No. 91-CA-426 (W.D. Tex. Dec. 24, 1991) ("Terrazas"), adopted its own interim plan for Senate elections in 1992.

In January 1992, the legislature enacted the submitted Senate redistricting plan, and the state sought to supplant the Terrazas court plan with the enacted plan. The Terrazas court denied the request to stay implementation of the court's plan for the 1992 elections and, in its January 10, 1992 opinion ruled that the enacted plan could not be implemented, even if it were precleared under Section 5, because it "fails to satisfy the

Sec. 2 requirements of the Voting Rights Act," op. at 12-13.

We know that the state has appealed the relevant rulings in the Terrazas action, and that the appeal is pending in the United States Supreme Court. On several occasions, however, the Supreme Court has declined to stay the use of the Terrazas court's Senate redistricting plan for the 1992 election. Thus, at this time the extant orders in the Terrazas action preclude the implementation of the submitted redistricting plan for the 1992 election. Moreover, the finding that the submitted plan violates Section 2 would appear to preclude its use thereafter.

Under these circumstances, it is not clear that the state is entitled to invoke Section 5 to obtain either an administrative or judicial determination on the merits of the submitted plan. We recognize that the Supreme Court's decision on the state's appeal in Terrazas may determine whether the submitted plan is capable of implementation. But in view of the statutory time constraints, an administrative determination under Section 5 may not be deferred pending that ruling.

The Voting Rights Act requires that the submitting authority demonstrate that the proposed change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 520 (1973); see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, preclearance may not be obtained for a voting change that clearly violates Section 2 of the Voting Rights Act, as amended, 42 U.S.C. 1973; 28 C.F.R. 51.55 and 51.56.

In this situation, a federal district court has ruled that the submitted redistricting plan may not be used, in part, because the plan violates Section 2. That ruling, although challenged by the state, has not been vacated or reversed. Accordingly, I cannot conclude, as I must under the Voting Rights Act, that the plan meets the Act's preclearance requirements. Therefore, on behalf of the Attorney General, I must object to the redistricting plan contained in Senate Bill No. 1 (1992).

Of course, as provided by Section 5, the state has the right to seek a declaratory judgment granting preclearance for the submitted redistricting plan from the United States District Court for the District of Columbia. As you are aware, the state has indicated it may do so in the context of the pending preclearance litigation concerning statewide redistricting. Texas v. United States, No. 91-2383 (D.D.C.).

The state also may request that the Attorney General reconsider the objection. In addition, reconsideration at the instance of the Attorney General may be appropriate "[w]here there appears to have been a substantial change in operative fact or relevant law." 28 C.F.R. 51.46(a). However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the submitted redistricting plan for the Texas Senate continues to be legally unenforceable under Section 5. Clark v. Roemer, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.46.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Steven H. Rosenbaum, Deputy Chief of the Voting Section at (202) 307-3143.

Sincerely,

/s/
John R. Dunne
Assistant Attorney General
Civil Rights Division

(5)

No. 91-1270

Supreme Court, U.S.
FILED
JUN 8 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, ET AL.,
APPELLANTS

v.

LOUIS TERRAZAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the district court properly determined that the State of Texas's newly enacted redistricting plan required preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether preclearance under Section 5 establishes the prima facie validity of a redistricting plan so as to preclude interim injunctive relief under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, absent extreme and unique circumstances.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1270

ANN RICHARDS, GOVERNOR OF TEXAS, ET AL.,
APPELLANTS

v.

LOUIS TERRAZAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. In May 1991, the State of Texas enacted Senate Bill (S.B.) 31, which redistricted the State Senate in light of the 1990 census. Appellees Terrazas, Angelo, and Craddick promptly filed suit in federal district court challenging that plan. J.S. App. 27a. They alleged that the plan diluted minority voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. J.S. App. 27a, 38a. They also

alleged that the redistricting plan was the product of partisan gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. J.S. App. 27a, 34a. A three-judge court was convened to consider those claims. *Id.* at 27a.

Meanwhile, another group of voters (the *Mena* plaintiffs) had challenged S.B. 31 in state court. J.S. App. 27a. They alleged that the 1990 census undercounted minorities and that S.B. 31's use of census data in redistricting violated the Texas Constitution. *Id.* at 26a-27a. In August 1991, the state trial court ruled in favor of the *Mena* plaintiffs, and ordered the State to submit new redistricting plans using adjusted population data. *Id.* at 28a.

The parties to the state court proceeding then negotiated a compromise redistricting plan. J.S. App. 29a. In October 1991, the state trial court entered the settlement plan in a new suit styled *Quiroz* v. *Richards*. *Ibid.* The State promptly withdrew its previous submission of S.B. 31 to the Department of Justice for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, seeking instead to have the Department preclear the new *Quiroz* plan. J.S. App. 29a. The Department of Justice precleared that plan in November 1991. *Ibid.*

Appellees—the plaintiffs in the federal court action —then filed a mandamus petition in the Texas Supreme Court challenging the *Quiroz* plan on state law grounds. J.S. App. 30a. In December 1991, the Texas Supreme Court granted the petition, concluding that the state trial court had abused its discretion by approving the *Quiroz* plan without first conducting an adversary proceeding. *Ibid.* The supreme court ordered the trial court's plan vacated. *Terrazas* v. *Ra-*

mirez, No. D-1817 (Tex. Sup. Ct. Dec. 17, 1991). As a result, the State was left without any valid redistricting plan to implement for the upcoming primary elections: S.B. 31 could not be implemented because it had never received Section 5 preclearance, and the *Quiroz* plan could not be implemented because it had been invalidated under state law.

2. In October 1991, the three-judge federal district court in this case had invited the parties to submit proposed interim redistricting plans to be used in the event that no state plan received Section 5 preclearance in time for the 1992 elections to proceed as scheduled. J.S. App. 29a-30a. On December 24, 1991, following the Texas Supreme Court's invalidation of the *Quiroz* plan, the three-judge court adopted its own interim redistricting plan for the State Senate. *Id.* at 49a. The court explained that it was compelled to act because "there are no legal plans reapportioning seats for election to the Texas * * * Senate that have been precleared by the [Department of Justice]." *Id.* at 31a. The court specifically noted that the *Quiroz* plan was not effective under state law, but was merely a non-binding alternative proposal that happened to have received preclearance. *Id.* at 39a.

The court concluded that the invalidation of the *Quiroz* plan left S.B. 31 as the clearest expression of the State's redistricting policy. J.S. App. 38a, 43a, 48a. Accordingly, the court examined appellees' claims that S.B. 31 violated Section 2 and the federal Constitution, and found that appellees had established a likelihood of success on their Section 2 claim. J.S. App. 38a-43a. Accordingly, the court entered its own "interim plan" for the March 10, 1992, primary elections that purported to remedy the perceived Section 2 violations. J.S. App. 19a. The court also extended

the filing deadline for the March 10 primary to January 10, 1992.

Judge Garwood dissented in part. He noted that the Governor had recently called the Texas State Legislature into special session to adopt a new redistricting plan. Judge Garwood would have expressly reserved for the State an opportunity to craft a lawful alternative to the court's interim plan, provided that the State was able to do so in a timely manner. J.S. App. 51a.

3. On January 8, 1992, during the special session called by the Governor, the Texas State Legislature enacted the *Quiroz* plan, now denominated S.B. 1, for use in the March 10 primary. J.S. App. 4a-5a; J.S. 6. In addition, the legislature enacted House Bill (H.B.) 2, which extended the filing deadline for State Senate candidates to January 17, 1992. H.B. 2 also provisionally altered the timing of the primary elections, retaining March 10 as the preferred date but setting April 11 as the fallback date in the event that the *Quiroz* plan had not been ordered into effect by the court by January 17. J.S. 6.

On January 9, 1992, the State filed a motion with the three-judge district court asking that court to vacate its December 24, 1991, interim plan and to allow S.B. 1 to take effect. J.S. App. 1a-2a. The State also submitted S.B. 1 to the Department of Justice for preclearance under Section 5. Mot. to Aff., App. C4.

The district court denied the State's motion on January 10, 1992. The court saw no indication that S.B. 1 "would enhance minority voting strength over that provided in [the] [c]ourt's interim plan." J.S. App. 5a. Rather, the court found that its own plan "provides a greater opportunity for all minority citi-

zens of the State of Texas to elect representatives of their choosing." *Ibid.*

The district court acknowledged the principle that a federal court must afford a State a reasonable opportunity to remedy defects in its redistricting plans before resorting to the remedy of a court-ordered plan. J.S. App. 2a. In this case, however, the court found that implementation of S.B. 1 and H.B. 2 at this late date "would result in postponement of the 1992 primary" and cause a "tremendous drain on the public treasury for the apparent benefit of so few." *Id.* at 8a. Although H.B. 2 purported to leave the March 10 primary date intact, the court observed that under Texas law the new redistricting legislation would not take effect until mid-April. *Id.* at 9a. The court also noted that the Department of Justice would be required to take a fresh look at the purpose and effect of S.B. 1 and H.B. 2 under Section 5 of the Voting Rights Act; the newly enacted plan was not automatically precleared simply because the Department of Justice had precleared the same map after the entry of the *Quiroz* settlement. J.S. App. 10a-11a. Moreover, the court noted that it would be required to hold a hearing to consider objections to the legality of S.B. 1, further delaying the time when a primary could occur. J.S. App. 11a. For these reasons, the court concluded that any effort to implement S.B. 1 would likely require postponing the scheduled primary elections until the summer of 1992. *Ibid.* This delay would cost approximately 10 to 15 million dollars, and might cause voter confusion and reduced voter turn-out, especially among Hispanic voters. *Id.* at 11a-12a.

Alternatively, the court held that even if S.B. 1 received preclearance under Section 5, the court would not approve its use as an interim plan. J.S. App.

12a-13a. The court explained that it "ha[d] already reviewed testimony and other evidence on the Senate's substitute plan during the December hearings and finds it fails to satisfy the Sec. 2 requirements of the Voting Rights Act." *Id.* at 13a.

Judge Garwood dissented. He indicated that he would have entered an order that provided for numerous alternative scenarios, dependent upon the receipt and timing of Section 5 preclearance. His order would have provided that if the Department of Justice objected to S.B. 1 by January 17, the court-ordered plan would be used on March 10. If the Department precleared S.B. 1 by January 17, the court would then pass on the legality of S.B. 1 under Section 2; if the court found the plan to be lawful, it would be implemented for the March 10 election. If the Department did not preclear or object to the plan by January 17, Judge Garwood would move the primary elections to April 11. If S.B. 1 then received Section 5 preclearance and a favorable Section 2 ruling from the court prior to February 18, the April 11 election would be held under that plan. Otherwise, the April 11 election would be held under the court-implemented plan now in effect. J.S. App. 16a-17a.

The State applied to this Court for a stay pending appeal of the district court's order. *Richards* v. *Terrazas*, No. A-498. This Court denied the application. 112 S. Ct. 924 (1992).

4. In September 1991, the State had filed suit in the United States District Court for the District of Columbia, seeking a declaration that its various redistricting plans did not violate Section 5 of the Voting Rights Act. On February 5, 1992, the State moved for partial summary judgment in that case, asking the court to rule that the implementation of S.B. 1 would not violate Section 5. Mot. to Aff., App. C1.

The district court denied that motion. It held that S.B. 1 had not already been precleared by virtue of the Justice Department's preclearance of the *Quiroz* plan, and that S.B. 1 would have to be compared with the benchmark *Terrazas* court plan in order to determine whether S.B. 1 had any retrogressive effect. *Id.* at C6-C9. The court concluded that an evidentiary hearing would be required before any such determination could be made. *Id.* at C8. The court also held that an evidentiary hearing was required to determine whether the State enacted S.B. 1 with a discriminatory purpose. *Id.* at C7-C8, C10.

In March 1992, the Attorney General objected to S.B. 1. Supp. J.S. App. 1a-3a. The objection letter explained that the Attorney General was objecting because the three-judge court had concluded that S.B. 1 violated Section 2, and that ruling had not been vacated or reversed. J.S. App. 2a; see 28 C.F.R. 51.55(b)(2) (Attorney General shall withhold Section 5 preclearance when "a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2").

DISCUSSION

The State of Texas contends that the district court had no authority under Section 5 to prevent implementation of S.B. 1 because the Attorney General had already precleared the identical *Quiroz* plan. The State further argues that a presumption of validity attaches to precleared plans, and that the district court therefore erred in precluding the State from implementing S.B. 1. Neither of those contentions warrants full briefing and argument.

1. a. Section 5 of the Voting Rights Act of 1965 provides that covered jurisdictions, including the

State of Texas,[1] may not implement "any * * * standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972," without first receiving judicial preclearance from the United States District Court for the District of Columbia or administrative preclearance from the Attorney General. 42 U.S.C. 1973c. To receive preclearance, a jurisdiction must show that its proposed change in election practices "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Ibid.* In deciding whether a change has a discriminatory effect, the principal question is whether it is retrogressive, *i.e.*, whether it makes minority group members worse off than they were before "with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976); see *Lockhart* v. *United States*, 460 U.S. 125, 134 n.10 (1983).

Redistricting plans are changes in "standard[s], practice[s], or procedure[s] with respect to voting." See *McDaniel* v. *Sanchez*, 452 U.S. 130, 137, 138 (1981); *Wise* v. *Lipscomb*, 437 U.S. 535, 542 (1978) (opinion of White, J.); *United Jewish Orgs. of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 157 (1977) (opinion of White, J.); *Beer* v. *United States*, 425 U.S. at 133; 28 C.F.R. 51.13(e); see also *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 828 (1992). Accordingly, a State covered by Section 5 may not implement a new redistricting plan without first persuading either the United States District Court for

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[1] The preclearance requirement was extended to Texas in 1975. See 40 Fed. Reg. 43,746 (1975); *Lockhart* v. *United States*, 460 U.S. 125, 129 (1983).

the District of Columbia or the Attorney General that the new plan has neither a discriminatory purpose nor a retrogressive effect.

The State of Texas does not challenge these basic Section 5 principles. Rather, the State argues that because the S.B. 1 plan and the *Quiroz* plan are identical, and because the State had begun to implement the *Quiroz* plan after receiving preclearance, the S.B. 1 plan is not a change with respect to voting and is not retrogressive from the benchmark *Quiroz* plan. J.S. 10-12. Those arguments are insubstantial.

To determine whether there has been a change with respect to voting for purposes of Section 5, a court must compare the challenged practice with the one actually in effect at the time the jurisdiction became subject to the preclearance requirement. 42 U.S.C. 1973c; *Hathorn* v. *Lovorn*, 457 U.S. 255, 265 n.16 (1982); *United States* v. *Board of Supervisors*, 429 U.S. 642, 647 n.3 (1977); *Perkins* v. *Matthews*, 400 U.S. 379, 394-395 (1971); S. Rep. No. 295, 94th Cong., 1st Sess. 45 (1975) ("Section 5 freezes the electoral laws and procedures of [covered] jurisdictions as of November 1, 1964 or 1968 [or 1972]."). The State does not deny that S.B. 1 is different from the senatorial districting plan in effect in 1972, and thus Section 5 preclearance is required by the plain language of the statute.

The State contends, however, that S.B. 1 is not a change from preexisting state law because it merely codified the *Quiroz* plan. That contention is incorrect.[2]

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[2] It is also beside the point. Section 5 "in express terms reaches any standard, practice, or procedure 'different from that in force or effect on November 1, 19[72].'" *Perkins* v. *Matthews*, 400 U.S. 379, 394 (1971). The *Quiroz* plan, of course, was not "in force or effect" in 1972.

When the State enacted S.B. 1 in January 1992, the *Quiroz* plan was *not* the law of the State of Texas, since it had been ordered vacated by the Texas Supreme Court. J.S. App. 31a. Thus, S.B. 1 *did* constitute a change in the districting plan for the State Senate, and accordingly it was unquestionably subject to preclearance under Section 5. See 28 C.F.R. 51.12 ("Any change affecting voting, even though it * * * returns to a prior practice or procedure, * * * must meet the section 5 preclearance requirement.").

Nor did the Attorney General's preclearance of the *Quiroz* plan operate to preclear S.B. 1. Although the two plans are identical, the preclearance issues are much different. In preclearing a proposed change in voting practices and procedures, the Attorney General must consider whether the change has *either* the purpose *or* the effect of abridging the right to vote on account of race.[3] *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 469 (1987); *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980). The fact that the Attorney General determined in November 1991 that a redistricting plan approved by a *state court* did not have an impermissible purpose obviously sheds no light on the question whether a redistricting plan enacted by the *legislature* in January 1992 had such a purpose. Thus, the State was required to submit S.B. 1 for preclearance—as it did—and was not permitted to implement its new districting plan until

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[3] A change may have an impermissible purpose under Section 5 even in the absence of any impermissible effect. *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 471 & n.11 (1987); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975).

the Attorney General had expressed no objections or the 60-day period had expired.[4]

Moreover, because the S.B. 1 plan constituted a change with respect to voting that had not been precleared, the district court had authority under Section 5 to prevent the State from implementing that change unless and until preclearance had been obtained. Indeed, under this Court's decision in *Clark* v. *Roemer*, 111 S. Ct. 2096, 2101 (1991), the district court was required to follow that course. As this Court explained in *Clark*, "[i]f voting changes subject to [Section] 5 have not been precleared, the [Section] 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." *Ibid.*

b. The State contends in the alternative that the district court erred in imposing its own reapportionment plan rather than deferring to the legislature's reapportionment preferences as reflected in S.B. 1. See J.S. 13-14 (citing *Upham* v. *Seamon*, 456 U.S. 37, 40-41 (1982); *White* v. *Weiser*, 412 U.S. 783, 795 (1973)). That contention rests on an incorrect factual premise. At the time the district court imposed its plan, S.B. 1 had not yet been adopted, and thus it was obviously not entitled to deference as a legislative expression of reapportionment preferences.

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[4] The Department of Justice's contemporaneous determination that S.B. 1 is subject to Section 5 preclearance is "entitled to particular deference." *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 39 (1978). See *City of Pleasant Grove* v. *United States*, 479 U.S. at 468; *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 179 (1985); *United States* v. *Board of Comm'rs*, 435 U.S. 110, 131 (1978). On January 4, 1992, the Assistant Attorney General for Civil Rights concluded that "[a]ny plan enacted by the Texas Legislature [would] require[] submission under Section 5 of the Voting Rights Act * * * even if the Legislature passed a plan identical to the *Quiroz* Senate plan." Mot. to Aff., App. B2.

Moreover, the State's argument fails to acknowledge that S.B. 1 was of no legal force or effect even after its adoption by the legislature, because it had not received Section 5 preclearance. *Clark* v. *Roemer*, 111 S. Ct. 2096, 2101 (1991); *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 175 n.19 (1985); *Wise* v. *Lipscomb*, 437 U.S. 535, 532 (1978) (opinion of White, J.); *Morris* v. *Gressette*, 432 U.S. 491, 497 n.8 (1977); *Connor* v. *Waller*, 421 U.S. 656 (1975) (per curiam). Under *Upham* v. *Seamon*, the lower federal courts are obligated to defer to a State's reapportionment preferences only "in the absence of a finding that the * * * [State's] reapportionment plan offend[s] either the Constitution or the Voting Rights Act." 456 U.S. at 43. Since S.B. 1 was presumptively invalid and unenforceable under Section 5 of the Voting Rights Act unless and until precleared, it was not entitled to deference.[5] Accordingly, the district court was free to adopt its own plan. See *Wise* v. *Lipscomb*, 437 U.S. at 542 (opinion of White, J.) ("Pending [Section 5] submission and clearance, * * * federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans.").

The State's broader interpretation of the duty to defer to state redistricting preferences would have

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[5] For the same reason, appellants are incorrect in asserting (J.S. 17) that the district court should have deferred to the legislature's enactment of H.B. 2, which sought to change the filing period for, and date of, the primary election. Changes in candidate filing periods and election dates are subject to Section 5 preclearance. *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 176-179 (1985); *Garcia* v. *Guerra*, 744 F.2d 1159, 1164-1165 (5th Cir. 1984), cert. denied, 471 U.S. 1065 (1985).

the effect of sanctioning an end-run around the requirements of Section 5. The district court obviously could not have applied S.B. 1 without first satisfying itself that S.B. 1 was valid under federal law. But this Court has made clear that federal district courts, other than the United States District Court for the District of Columbia, lack jurisdiction to consider whether unprecleared state election laws comply with the substantive requirements of Section 5. As the Court said in *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985), the district court was not in a position "to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or to the District Court for the District of Columbia." See also *Hathorn* v. *Lovorn*, 457 U.S. 255, 267 (1982); *McDaniel* v. *Sanchez*, 452 U.S. 130, 150 n.31 (1981); *Wise* v. *Lipscomb*, 437 U.S. at 542 (opinion of White, J.); *United States* v. *Board of Supervisors*, 429 U.S. 642, 646 (1977) (per curiam); *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971). Accordingly, it would have been error for the district court to decide whether S.B. 1 complied with Section 5, and thus the court could not defer to the legislative preferences expressed in that presumptively invalid state statute.

Nor did the district court err in declining to delay the implementation of its redistricting plan pending the State's attempt to obtain administrative preclearance of S.B. 1. The majority of the three-judge court found that further delay would prevent primary elections from being held as scheduled and require their postponement into the summer, with a potentially disruptive effect on voter turnout and on the voting

rights of Hispanics. J.S. App. 10a-12a. In light of those findings, which appellants do not challenge as clearly erroneous, and because all parties conceded that holding elections under the plan that predated the 1990 census would violate one person, one vote requirements, the district court did not abuse its discretion in imposing its own interim plan. See *Wise* v. *Lipscomb*, 437 U.S. at 540 (opinion of White, J.); *Burns* v. *Richardson*, 384 U.S. 73, 85 (1966).

2. The State also contends (J.S. 14-18) that administrative preclearance under Section 5 establishes the prima facie validity of a redistricting plan so as to preclude interim injunctive relief under Section 2 except in extreme and unique circumstances. As explained above, that question is not properly presented in this case, because S.B. 1 was never given administrative preclearance. In any event, the State's contention is devoid of merit.

By the express terms of Section 5, neither administrative nor judicial preclearance of a change in voting practices or procedures "shall bar a subsequent action to enjoin enforcement of" that change. 42 U.S.C. 1973c; see also 28 C.F.R. 51.49 ("The preclearance by the Attorney General of a voting change does not constitute the certification that the voting change satisfies any other requirement of the law beyond that of section 5."). Every court that has addressed this issue has rejected the notion that the Attorney General's failure to object provides a defense to a subsequent action challenging the validity of the precleared change.[6] Instead, it is undisputed that

---

[6] See, *e.g.*, *Morris* v. *Gressette*, 432 U.S. 491, 506-507 (1977) ("Where the discriminatory character of an enactment is not detected upon [preclearance] review by the Attorney General, it can be challenged in traditional constitu-

"the * * * Attorney General's preclearance determination has no probative value," and that "[p]rivate plaintiffs are free to mount a *de novo* attack upon a reapportionment plan notwithstanding preclearance." *Major* v. *Treen*, 574 F. Supp. 325, 327 n.1 (E.D. La. 1983).[7]

In any event, the State's contention that administrative preclearance should insulate election-law changes from interim injunctive relief is wholly beside the point. S.B. 1 did not receive administrative preclearance, and thus the district court was obligated to prevent its implementation even under the State's view of the law. *Clark* v. *Roemer*, 111 S. Ct. 2096, 2101 (1991). As this Court has explained, "[t]he application of [Section 5] is not dependent on a showing that the [covered jurisdiction's] proposed plan is defective in any way." *McDaniel* v. *Sanchez*,

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tional litigation."); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 549-550 (1969) ("Once the State has successfully complied with the [Section] 5 approval requirements, private parties may enjoin the enforcement of the new enactment * * * in traditional suits attacking its constitutionality."); *United States* v. *East Baton Rouge Parish School Bd.*, 594 F.2d 56, 59-60 n.9 (5th Cir. 1979); *Gunn* v. *Chickasaw County*, 705 F. Supp. 315, 321 (N.D. Miss. 1989) (preclearance under Section 5 does not preclude a Section 2 challenge); *Mississippi State Chapter, Operation PUSH* v. *Allain*, 674 F. Supp. 1245, 1261, 1262 (N.D. Miss. 1987) (same); *Martin* v. *Allain*, 658 F. Supp. 1183, 1200 (S.D. Miss. 1987) (same); *Major* v. *Treen*, 574 F. Supp. 325, 327 n.1 (E.D. La. 1983) (same).

[7] Any consideration of the preclusive effect of Section 5 preclearance must take into account the fact that the Department of Justice reviews thousands of Section 5 submissions annually. In 1991, for example, the Department received nearly 4,600 submissions requesting preclearance of over 19,000 election-law changes.

452 U.S. 130, 151 (1981). Thus, the district court acted properly in declining to give effect to S.B. 1 because it had not received preclearance, *regardless* of whether S.B. 1 complies with Section 2 of the Voting Rights Act.[8]

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[8] Because the district court was clearly correct in concluding that S.B. 1 was subject to the preclearance requirements of Section 5, we express no opinion concerning the court's contingent finding that S.B. 1 would be unenforceable under Section 2 of the Voting Rights Act, even if it were to become law. See J.S. App. 12a-13a. Moreover, that issue is not, in our view, "fairly included" within the questions presented by appellants in their jurisdictional statement. Sup. Ct. R. 14.1(a), 18.3. The effect, if any, of the district court's Section 2 finding on Section 5 preclearance is among the issues pending before the three-judge court of the United States District Court for the District of Columbia, and should be addressed there in the first instance.

CONCLUSION

The judgment of the district court should be summarily affirmed.

Respectfully submitted.

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JUNE 1992

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No. 91-1270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, *et al.*,
Appellants,

vs.

LOUIS TERRAZAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLANTS' SECOND SUPPLEMENT TO JURISDICTIONAL STATEMENT AND OPPOSITION TO MOTION TO AFFIRM

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June 25, 1992

APPELLANTS' SECOND SUPPLEMENT TO JURISDICTIONAL STATEMENT

Pursuant to the Court's Rule 18.9, Ann Richards, Dan Morales, and John Hannah, Jr., respectively the Governor, the Attorney General, and the Secretary of State of Texas (appellants herein and hereinafter collectively termed "the state"), supplement for the second time their Jurisdictional Statement, based on developments of which they became aware only this morning, June 25, 1992:

Recent Development

On June 24, 1992, in the pending section 5 declaratory judgment action of *Texas v. United States*, No. 91-2383 (D.D.C.), the United States filed a Memorandum of the United States in Response to Plaintiff's Motion for Trial Setting. A copy of the United States' memorandum (omitting the certificate of service and cases attached to it) is attached to this second supplement.

The United States has concluded that, based upon analysis of the information (including the results of the 1992 primary elections under the interim court-ordered plan challenged in this appeal) developed during pretrial discovery:

> [W]e would not oppose the granting of a declaratory judgment by this Court that S.B. 1 is entitled to Section 5 preclearance. Therefore, as between the State of Texas and the United States, there is no need for a trial.

U.S. Memorandum at 3 (footnote omitted).

Significance of the Development

Although the D.C. district court has not entered an order yet, the position taken by the United States effectively

means two things related to this appeal: (i) S.B. 1 is now effectively a precleared, legislatively-enacted redistricting plan for the Texas Senate, *cf. Morris v. Gressette*, 432 U.S. 491 (1977) (Attorney General has non-reviewable discretionary authority to preclear legislative plans); and (ii) S.B. 1 is superior to the challenged interim court-ordered Senate redistricting plan in protecting minority voting rights, inasmuch as the D.C. federal district court litigation had pitted S.B. 1 against the challenged court plan, *see Texas v. United States*, 785 F.Supp. 201 (D.D.C. 1992).

The state's basic argument in this appeal -- that the November 18, 1991, administrative preclearance of the *Quiroz/Mena* state court-ordered plan constitutes preclearance of the January 8, 1992, legislatively-enacted S.B. 1, thereby leaving no vacuum for the Texas-based federal district court to fill through its January 10, 1992, order -- has found empirical validation.* Surely, at this point in the process (especially with the challenged preliminary injunction having run its course), *this* Court owes the state the federalism-based deference which the two-member majority of the district court never gave. Events have repudiated the United States' arguments for a contrary approach. *See* U.S. Br. at 13.

Furthermore, the invalidity of the Texas-based federal district court's globally-stated indication that S.B. 1 (*i.e.*, the *Quiroz/Mena* plan) violates section 2 of the Voting Rights Act has been further highlighted by the United States' filing of yesterday because, in the section 5 preclearance domain, the Department of Justice looks to whether a change would present a "clear violation of amended section 2." 28 C.F.R. § 51.55(b)(2). Apparently, its view is that S.B. 1

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* There is empirical validation, too, in the fact that we now have results from real elections which show the legislative plan clearly superior to the challenged court-ordered plan.

does not, notwithstanding the statements in the order challenged here.

Summary reversal is more than warranted. It would be a travesty (in a case whose only reason for being at this stage is to protect minority voting rights) to compel the state to put aside its legislatively-enacted Senate redistricting plan and use instead a court-ordered redistricting plan that is nearly universally-recognized to lessen the protection of minority voters in comparison to the state's precleared plan.

Respectfully submitted,

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June 25, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	§	
Plaintiffs	§	
	§	
vs.	§	
	§	
UNITED STATES OF	§	
AMERICA,	§	Civil Action No. 91-2383
Defendant,	§	(PMW, U.S.C.A., JHG, SS)
AUSTIN NEGRETE, et al.,	§	
Defendant-Intervenors,	§	
and	§	
LOUIS TERRAZAS, et al.,	§	
Defendant-Intervenors.	§	

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO PLAINTIFF'S MOTION FOR TRIAL SETTING

Plaintiff State of Texas has moved this Court to schedule the trial of this case at the earliest possible date. In its Second Amended Complaint, the State seeks a declaration by this Court that S.B. 1, the redistricting plan for the Texas Senate enacted on January 8, 1992, is entitled to preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c ("Section 5").

On January 9, 1992, the State submitted S.B. 1 to the Attorney General for administrative review under Section 5. A timely objection was interposed to S.B. 1 on

March 9, 1992. Our determination letter explained that the Attorney General was objecting because the three-judge court in Terrazas v. Slagle, Civil No. A-91-CA-426, slip op. at 10 (W.D. Tex. Jan. 10, 1992), had concluded that S.B. 1 violated Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, ("Section 2") and that ruling had not been vacated or reversed. See 28 C.F.R 51.55(b)(2) (the Attorney General shall withhold Section 5 preclearance when "a bar to implementation of the change is necessary to prevent a clear violation of Section 2"); 28 C.F.R. 51.56 ("the Attorney General will be guided by the relevant decisions of the . . . Federal courts"). Appeals from the rulings of the Terrazas court are pending in the United State Supreme Court.

On February 4, 1992, the State moved for partial summary judgment in the instant action, seeking alternative declaratory judgments that: (1) because S.B. 1 is substantively identical to the Quiroz/Mena plan which was precleared by the Attorney General on November 18, 1991, the Attorney General had already precleared S.B. 1; (2) the precleared Quiroz/Mena plan is the appropriate benchmark against which to measure S.B. 1 and, inasmuch as S.B. 1 is identical to that benchmark, there could be no retrogression; or (3) S.B. 1 is not subject to Section 5 review because the only change from the precleared Quiroz/Mena plan is the procedural mechanism by which it was adopted. In denying the State's motion, this Court concluded that the Terrazas court-ordered plan is the appropriate benchmark against which to compare S.B. 1 and that summary judgment

would be inappropriate to determine whether S.B. 1 is retrogressive with respect to the Terrazas plan and whether S.B. 1 was adopted with a discriminatory purpose. State of Texas v. United States, 785 F. Supp. 201 (D.D.C. 1992).

Pursuant to this Court's order of March 19, 1992, discovery closed on May 15, 1992. We have analyzed carefully the information we had obtained during the course of our administrative review of statewide redistricting plans in Texas, as well as the information we have obtained in discovery, including data concerning the 1992 elections under the Terrazas court plan. Based upon this information and our analysis, we would not oppose the granting of a declaratory judgment by this Court that S.B. 1 is entitled to Section 5 preclearance.[1] Therefore, as between the State of Texas and the United States, there is no need for a trial.

We note, however, that there are intervenors in the case who may continue to oppose Section 5 preclearance

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1 Inasmuch as the December 24, 1991 and January 10, 1992 orders of the Terrazas court do not constitute final judgments, neither the factual nor the legal findings of that court are preclusive in the case at bar. See, e.g., Ashe v. Swenson, 397 U.S. 436 , 443 (1970) (application of the doctrine of collateral estoppel requires determination of an issue of ultimate fact "by a valid and final judgment"); Starbuck v. City and County of San Francisco, 556 F.2d 450, 457, n.13 (9th Cir. 1977) ("a preliminary injunction . . . is not a final judgment sufficient for collateral estoppel purposes"). On the other hand, Section 5 preclearance does not "bar a subsequent action to enjoin enforcement of [S.B. 1]", 42 U.S.C. 1973c, pursuant to Section 2 or on other grounds. E.g., Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1261-62 (N.D. Miss. 1987); Major v. Treen, 574 F. Supp. 325, 327 n.1 (E.D. La. 1983).

of S.B. 1. See, e.g., City of Lockhart v. United States, 460 U.S. 125, 129-30 (1983) (intervenor defended district court's denial of Section 5 preclearance on appeal, while United States agreed with city's contention that voting changes were not retrogressive); City of Port Arthur v. United States, Civil Action No. 80-0648 (D.D.C. Jul. 14, 1982),[2] aff'd 459 U.S. 159 (1982) (intervenors opposed plan submitted jointly by the city and the United States); City of Richmond v. United States, 422 U.S. 358, 366-67 (1975) (intervenors opposed the consent judgment submitted to the district court by the city and the United States); City of Petersburg v. United States, No. 509-72 (D.D.C. Apr. 13, 1973),[3] aff'd mem. sub nom. Diamond v. United States, 412 U.S. 901 (1973) (the United States did not oppose a declaratory judgment preclearing annexations and a change to a ward system from an at-large method of election, but defendant-intervenors took an appeal).[4] A trial may be necessary if defendant-

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2 A copy of the unreported district court order is appended as Attachment A.

3 A copy of the unreported district court order is appended as Attachment B.

4 Compare Senate of California v. Smith, No. 81-2767 (D.D.C. Apr. 27, 1982) (intervention denied to applicants who would have opposed entry of declaratory judgment to which the United States consented) (copy appended as Attachment C) and State of Mississippi v. United States, Civil Action No. 82-2673 (D.D.C. Jan. 13, 1983), aff'd sub nom. Kirksey v. Mississippi, 464 U.S. 801 (1983) (intervention denied to applicants who opposed the joint motion of the State and the United States to dismiss a Section 5 declaratory judgment action following administrative preclearance by the Attorney General) (copy appended as Attachment D).

intervenors proffer evidence of a triable issue. If a trial is held, the United States reserves its right to reassess its position on preclearance based upon the evidence that may be adduced at such trial.

Respectfully submitted

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No. 91-1270

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, ET AL.

Appellants

v.

LOUIS TERRAZAS, ET AL.

Appellees

GUADALUPE MENA, MARIA GOMEZ, ZULEMA HERNANDEZ, JUAN ANGEL GARCIA, CHAYO FLORES ZALDIVAR, ROBERTO R. ALONZO, PATRICIA ROYBAL SUTTON, JOSE R. KENNARD, the EL PASO COALITION FOR FAIR REDISTRICTING, AUGUSTIN NEGRETE, BENJAMIN MENCHACA, RICHARD ARRIOLA, SAUL GONZALEZ, and MARC CAMPOS

Intervention-Applicants

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MOTION FOR LEAVE TO INTERVENE

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No. 91-1270

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, ET AL.

Appellants

v.

LOUIS TERRAZAS, ET AL.

Appellees

GUADALUPE MENA, MARIA GOMEZ, ZULEMA HERNANDEZ, JUAN ANGEL GARCIA, CHAYO FLORES ZALDIVAR, ROBERTO R. ALONZO, PATRICIA ROYBAL SUTTON, JOSE R. KENNARD, the EL PASO COALITION FOR FAIR REDISTRICTING, AUGUSTIN NEGRETE, BENJAMIN MENCHACA, RICHARD ARRIOLA, SAUL GONZALEZ, and MARC CAMPOS

Intervention-Applicants

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MOTION FOR LEAVE TO INTERVENE

Thirteen Mexican American individuals from throughout Texas and one community organization that protects voting rights of Mexican Americans in West Texas respectfully ask this Court for leave to intervene as parties in this case, pursuant to Federal Rule of Civil Procedure 24(a).

The Intervention-Applicants (designated as "Minority Applicants" for purposes of this motion) appreciate that they seek a seldom-granted remedy in this Court.

However, they believe the extraordinarily unusual circum-

stances that give rise to their seeking relief in this Court, together with the fact that they have rights vitally affected by this appeal, rights which are not adequately protected or represented by any party to this cause, are imperative enough to request the Court to allow them to intervene in order to safeguard their interests that would otherwise go undefended.

Because the Minority Applicants seek to vindicate fundamental voting rights and to prevent discrimination against those rights on the basis of national origin, they would suggest respectfully that this is the kind of unusual case that should compel the Court to look favorably upon this request for intervention. The Minority Applicants have no other means at their command to otherwise safeguard and defend their voting rights.

Indeed, the Minority Applicants on five different occasions have sought to intervene in the three-judge court below; and each time the court rebuffed them, the most recent occasion being by order of February 25, 1992, which rejected their third, fourth, and fifth applications for intervention. The first two times, the lower court denied their intervention attempts before the December 10, 1991 preliminary injunction hearing.

The Minority Applicants subsequently have sought review of that order by filing their sixth application to intervene on March 13, 1992, which addresses in detail the issues relied upon by the three-judge panel in rejecting applications two through five. To this date, the lower court has not acted on that motion, despite a subsequent request on April 13 from the Minority Applicants that it do so. See Appendix Attachment 1 to this motion. The Minority Intervenors thus have done all that they can to intervene below but

have faced repeated rejection.

Nevertheless, even were the lower court to deny intervention again, the Minority Applicants would only be able to appeal that denial to this Court and still would be unable otherwise to bring forward the question of the legal inadequacy of the judgment entered on December 24, 1991, and supplemented on January 10, 1992,[1] which derogated very significant state constitutional guarantees that are more protective of their voting rights than accorded by the December 24 and January 10 orders. See, e.g., United Auto Workers v. Scofield, 382 U.S. 205, 209-10 (1965); Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137 (1944); Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); Brotherhood of Railroad Trainmen v. Baltimore & R. Co., 331 U.S. 519 (1947); Cascade Natural Gas Corp. v. El Paso Gas Co., 386 U.S. 129 (1967); Trbovich v. United Mine Workers, 404 U.S. 528 (1972); NAACP v. New York, 413 U.S. 345, 364-69 (1973).

Further, since the Minority Applicants seek a modification of the temporary election decrees of December 24 and January 10 at issue before this Court, in order to supplant them with the legislatively-adopted election plan more protective of minority voting rights, as decreed by a Texas state district court on January 13, 1992 in Guadalupe Mena, et al. v. Ann Richards, et al., No. C-454-91-F, in the 332nd Judicial District for Hidalgo County, Texas

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[1] It should be noted that neither the December 24 order nor the January 10 order was unanimous. The Circuit Judge dissented both times on grounds of federalism.

Further, although the lower court made fact findings in its January 10 order, no evidentiary hearing whatever was ever conducted on the factual matters in that order, especially concerning comparisons of redistricting plans.

(finalizing a series of earlier orders that had been issued by the state court since August 22, 1991), the Court should allow them to intervene.[2] United States v. Terminal Railroad Ass'n, 236 U.S. 194, 199 (1915). See also Labor Board v. Acme Industrial Co., 384 U.S. 925 (1966), 385 U.S. 432 (1967); Eastern-Central Motor Carriers Assoc. v. United States, 321 U.S. 194, 198-99 n.5 (1944).

This appeal presents the configuration of unusual circumstances in which the Court on other occasions has allowed non-parties below to intervene, particularly to defend vital rights not being defended by any party to the appeal. See Banks v. Chicago Grain Trimmers Ass'n, 389 U.S. 813 (1967), 390 U.S. 459 (1968); and Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969). See also Bryant v. Yellen, 447 U.S. 352, 366 (1980); Rogers v. Paul, 382 U.S. 198, 199 (1965).

The Minority Applicants have no alternative other than intervention to bring forward their concerns and seek the protective mantle of this Court.

QUESTIONS SOUGHT TO BE PRESENTED BY MINORITY APPLICANTS

The questions, which are all substantial and which no party yet has presented to this Court and which the Minority Applicants seek to bring before the Court as reasons why it should set aside the December 24 and January 10 orders in this appeal are:

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[2] Because the Terrazas interim order basically incorporated the Mena v. Richards judgement/settlement as to the Texas House of Representatives, the Minority Intervenors direct their attention to the Terrazas Senate plan, which is much less protective of minority rights than the Mena plan (also referred to as "SB-1") inasmuch as the Mena plan eventually was adopted and approved by the Texas Legislature on January 8, 1992.

1. Whether the district court committed clear legal error by making findings and issuing a ruling under Section 2 of the Voting Rights Act without even conducting an evidentiary hearing thereon?

2. Whether, given the principles of federalism and the Fourteenth Amendment, as well as the Congressional intent behind the Voting Rights Act, a three-judge court may use the Voting Rights Act in derogation of relief afforded under state constitutional equal rights guarantees that more adequately protect minority voting rights than the plan promulgated by the three-judge panel?

3. Whether the Anti-Injunction Act permits a federal trial court to enjoin a state court from adjudicating challenges to the state's legislative districts?

4. Whether a federal trail court should defer to a state court where parallel actions are pending in each court challenging a state's legislative districts?

5. Whether the All Writs Act authorizes a federal trial court to enjoin implementation of a final judgment in a previously commenced state court action that redistricts the state legislature in accordance with state constitutional equal rights provisions, consistent with the Voting Rights Act?

CONSTITUTIONAL PROVISIONS INVOLVED

The Tenth Amendment to the United Constitution provides:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall ... deny any person within its jurisdiction the equal protection of the laws.

The Texas Constitution, article I, section 3, provides:

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

The Texas Constitution, article I, section 3a, provides:

> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national

origin. The amendment is self-operative.

The Texas Constitution, article I, section 19, provides:

> No citizen of this State shall be deprived of live, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. §2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

I. PROCEDURAL HISTORY LEADING TO THE INTERVENTION APPLICATION IN THIS COURT

The Minority Applicants, at five separate times pursuant to Federal Rule of Civil Procedure 24(a) and, alternatively, pursuant to Rule of Civil Procedure 24(b), sought to intervene and participate in this action below.

The Minority Applicants attempted to intervene as Plaintiffs in order to assure the continuing invalidity of HB-150 and SB-31, the original legislative plans redistricting the Texas House and Senate respectively, to insure the implementation of a legislative reapportionment plan that comports with both federal law and the Texas Constitution, and to protect the final state-court judgment on January 13, 1992 and other relief that they won under the Texas Equal Rights Amendment and other provisions of the Texas Constitu-

tion (Tex. Const. art. I, secs. 3, 3a, 19, 29) as plaintiffs in Mena v.Richards.

The Minority Applicants' efforts were all unsuccessful, their last three attempts being rebuffed together on February 25, 1992.

The Minority Applicants' first attempted intervention was for limited purposes, namely, opposing the Texas State Defendants' Motion for Stay of Court Proceedings in Mena. On August 2, 1991, the lower court overruled the State Defendants' application for stay and, in the same order, denied as moot the Minority Applicants' application.

On December 10, 1991, the Minority Applicants filed an amended motion to intervene, seeking to participate in the preliminary injunction hearing.[3] That application set forth the Minority Applicants' interests at stake, including the Mena proceedings that had concluded recently in state court, and the injunctive relief secured in Mena, since the initial intervention application.

Although the Minority Applicants believe that the three-judge court erred in denying their intervention attempts on December 10 and 12, they did not address again that issue. Rather, they sought to participate in the case as plaintiffs after entry of the December 24 preliminary injunction and from that point forward.

On January 2, 1992, the Minority Applicants filed their Third Motion to Intervene, again setting out their interests at stake in

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[3] At the time of the preliminary injunction hearing, the Republican Party plaintiffs had not conducted any discovery whatever; and defendants, only limited discovery. Nevertheless, the Minority Applicants, at the request of the Terrazas plaintiffs, had provided them with over 2,000 pages of documents, depositions, statements of fact, and exhibits from the Mena litigation.

the litigation and further delineating the circumstances presented by on-going proceedings in the state courts and legislature.

On January 8, the legislature, sitting in special session passed a new reapportionment plan which was nearly identical to that arrived at in settlement of, and as a result of, the Mena litigation.[4]

On January 9, the Minority Applicants filed their Fourth Motion to Intervene following the successful intervention of the Appellees here (except for Tom Craddick) in the Mena litigation on January 6, 1992.[5] One should note that Appellees' intervention came after the December 24 Terrazas order.

On January 13, 1992, the new Senate and House reapportionment plans (SB-1 and HB-1) were approved and adopted by Hidalgo County District Judge Mario E. Ramirez, Jr., presiding over the Mena litigation.

On January 15, the Minority Applicants filed their fifth motion to intervene.

On February 25, 1992, the lower court rejected the Minority Applicants' third, fourth, and fifth motions to intervene, the principal reasons being that the motions were not timely and that the interests of the Minority Applicants were adequately represent-

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[4] A more complete chronology of the events surrounding the Mena case, the legislative response thereto, and this litigation is set out in Appendix Attachment 2, excerpted from a report prepared by the House Research Organization for the Texas Legislature.

[5] Immediately thereafter, the Terrazas plaintiffs, after receiving deposition notices from the Minority Applicants, non-suited their intervention and declined to participate further in Mena. The same day they filed their own state court action in Midland County, Texas. Craddick v. Richards, No. 38,899.

ed by existing parties to the litigation.[6]

II. INTERVENTION BY THE MINORITY APPLICANTS IS REQUIRED BY LAW

The Minority Intervenor sought to intervene as plaintiffs under Federal Rule of Civil Procedure 24(a) (intervention as of right) and Rule 24(b) (permissive intervention). In either case, Rule 24 traditionally has received a liberal construction in favor of intervention. Washington State Bldg. & Const. Trades v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982), cert. denied sub nom. Don't Waste Washington Legal Defense Forum v. Washington, 461 U.S. 913 (1983), quoting 7A C. Wright & A. Miller, Federal Practice and Procedure sec. 1904 (1972).

The four-part test for intervention under Rule 24(a)(2) is as follows:

(1) The application for intervention must be timely;

(2) The applicant must have an interest relating to the subject of the action;

(3) The applicant must be so situated that the disposition of the action, as a practical matter, may impair or impede the ability to protect that interest; and,

(4) The applicant's interest must be represented inadequately by existing parties to the suit.

Texas v. United States Dept. of Energy, 754 F.2d 550, 552 (5th Cir. 1985).

A. THE TIMELINESS OF THE MINORITY APPLICANTS' EFFORTS TO INTERVENE

The first fault the lower court laid on the Minority Appli-

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[6] The trial court did not address why it had granted virtually all the other motions to intervene, regardless of when they have been filed, a number of them after the Minority Intervenors filed theirs.

cants' third, fourth, and fifth motions to intervene (filed January 2, 9, and 15, 1992, respectively) was that they were not timely. That arguably may have been the situation as to the second application relating to the December 10 preliminary injunction hearing. However, it assuredly was not true with respect to the three motions in January concerning subsequent activity in the case and the Minority Applicants' participation in the trial on the merits. The Minority Applicants sought to intervene as plaintiffs from that point forward, not retroactively.

Regardless, the Minority Applicants acted expeditiously throughout the litigation below to assert their pivotal interests in matters under consideration by the three-judge court.

For well over a year, the Minority Applicants consistently and vigorously worked to insure that the state legislative redistricting process equitably and fairly protected the voting rights of Mexican Americans in Texas, consistent with the equal rights mandate of the Texas Bill of Rights (Tex. Const. art. I, secs. 3, 3a, 19, 29) and in compliance with the Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973 and 1973(c).

When the original 1991 redistricting plans drawn by the state legislature (HB-150 and SB-31) using 1990 census data were enacted over their objections as violative of their rights, the Minority Applicants immediately sought redress in Texas state district court, where they ultimately prevailed.[7]

The Mena victory, which was finally effected on January 13,

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[7] This Terrazas action below was filed on May 22, 1991, three months after the Minority Intervenors first filed Mena v. Richards.

1992, protected electoral strength for Mexican Americans in Texas. As soon as it became clear to the Minority Applicants that their state court victory was threatened by a collateral proceeding before the three-judge court, they promptly sought intervention to safeguard these rights.[8]

"Timeliness is to be determined from all the circumstances. And it is to be determined by the Court in the exercise of its sound discretion." NAACP v New York, 413 U.S. 345, 366 (1973).

In reviewing "all the circumstances" as they relate to the timeliness of a motion to intervene, the point to which the suit has progressed is a relevant factor. NAACP, 413 U.S. at 365-66. The Minority Applicants' entrance into the case would have caused no repetition of effort. Nor would it have occasioned disruption of any trial schedule adopted by the three-judge panel because the court, to this date, has adopted none.

There was no warning that the Minority Applicants should attempt to intervene earlier than they did. Following denial of the stay application on August 2, 1991, the action below remained dormant as all parties became involved in the state district court cases of Mena and its related counterpart, Quiroz v. Richards, No. C-4395-91-F (332nd Judicial District of Texas, Hidalgo County).

Indeed, the August 2 order, refusing to interfere with the

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[8] The Mena Minority Citizens did not have a final state court judgment to protect in this Court until January 13, 1992, which is when they sought to intervene (January 2, 9, and 15), especially after it became clear on December 24, 1991 that the lower court would not defer to Texas judicial and legislative prerogatives on this question. They did win a temporary injunction on December 9, 1991 in Mena as to redistricting the Texas House and thus sought to intervene in the lower court the next day, a motion they again unsuccessfully renewed orally two days later.

Mena state court proceedings, specifically noted (p.3) that all the claims brought forward rested exclusively on alleged violations of Texas law. Similarly, the August order observed that none of the Terrazas plaintiffs sought to interfere with the progress of the Mena litigation (p.2).

Given that order and the posture of the case, there was no reason to assume that the Mena litigation would be placed at risk by the Terrazas plaintiffs. Indeed, a fair reading of the August 2 order is to the contrary, that the state proceedings would move forward unimpeded by federal intervention.

During this time, the parties were all involved in modifying the previously-passed legislative plans in response to the Mena lawsuit, which was finally settled on December 9, 1991 as to the Texas House. The very next day, the Mena Intervenors, now having a protectable interest, filed their amended (second) motion to intervene in order to safeguard the full voting rights for Mexican Americans in Texas. It was only at this point that the Minority Applicants were able to determine what interests were specifically at stake and which position they would have to take to safeguard their interests.

Courts have recognized the propriety of waiting to actually intervene until the nature of the interest at stake is clear. See, e.g., Jansen v. City of Cincinnati, 904 F.2d 336, 341 (6th Cir. 1990).

Further, the lower court gave rather short notice of the setting for the December 10 hearing. The notice, issued on November 25, 1991, immediately after Thanksgiving, set the hearing

two weeks later. No notice was given to the Minority Applicants.

Thus, the Minority Applicants acted with dispatch as soon as it became apparent they had an interest in the case. Nor can it be said the parties in this litigation were unaware of the Minority Applicants' interest and position on the various redistricting schemes. The Minority Applicants all along were central figures in challenging the 1991 redistricting of the Texas legislature. Indeed, the parties in the case were all intimately involved in the Mena proceedings: the Texas Defendants, as adverse parties; and the Appellees here, first as in-court observers, then as formally admitted party intervenors in Mena.

The Minority Applicants' application in this Court is timely; and they meet all the prerequisites for intervention as of right.

B. LACK OF PREJUDICE BY THE MINORITY APPLICANTS' INTERVENTION

Another factor to be considered with respect to timeliness is resulting prejudice to the original parties. Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1970).

With respect to prejudice to the parties in this case, there is none. There was not even a suggestion in the record that any party opposed the Minority Applicants' last three applications for intervention; and none argued that applications were not timely or that they were prejudicial thereby.[9]

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[9] The Mena Minority Citizens, as amici curiae, submitted extensive documentation at the December 10 hearing regarding the Mena House and Senate plans that they had secured, at least on a temporary basis, as of the time of the hearing. Indeed, those plans are close to those ultimately adopted by the Texas Legislature and approved by the state court on January 13, 1992 in Mena.

Thus, the plans proffered by the Mena Citizens were long before the court; and no party could claim prejudice because of

Indeed, given that the lower court's December 24 order indicated that trial would not occur until after the November 1992 elections, it is difficult to imagine how any party would be prejudiced by the Minority Applicants' entry into the litigation.

Similarly, the Minority Applicants' application in this Court does not prejudice any party to this appeal. Further, on April 13, 1992, counsel for the Minority Applicants sent a letter to all counsel involved in the Terrazas litigation, indicating their intent to seek intervention in this Court and inquiring as to whether any party opposed the intervention. To date, none have replied negatively. Three intervenors have replied positively.

C. THE MINORITY APPLICANTS HAVE A COMPELLING INTEREST IN THE SUBJECT MATTER OF THE LITIGATION WHICH WOULD BE IMPAIRED WITHOUT THEIR PARTICIPATION

The same reasons that favor the Minority Applicants' participation in the proceedings below favor their intervention in this appeal.

The purpose for which the intervention is sought should also be considered in evaluating the totality of the circumstances to determine the timeliness of an application. Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989). Here, the centrality of the interest asserted weighs in favor of intervention.

Fairly stated, no party to this litigation has a more com-

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that fact. Further, by the time of the preliminary injunction hearing the Minority Applicants had voluntarily provided over 2,000 documents, depositions, statements of fact, and exhibits to the Terrazas Appellees at their request.

What remained for the Mena Citizens to do was prove as an evidentiary matter that their plans are more protective of minority rights than the Terrazas interim plan. That they are more protective is shown by the comparisons drawn by the House Research Organization (included here as Appendix Attachment 9).

pelling interest in the subject matter of this case than the Minority Applicants, who are representative of Texas Mexican Americans whose voting rights are intended to be protected by the Texas Constitution and Voting Rights Act, 42 U.S.C. 1973b(f)(2). They have been the engine behind the entire effort to insure that redistricting lines are drawn in compliance with Texas constitutional law.

The Minority Applicants originally filed suit in state district court over the plans for the Texas House and Senate. After lengthy and costly litigation, they were able to secure a settlement with the Texas Appellants. This settlement was subsequently adopted by the legislature and ratified by Judge Ramirez; this plan is at issue in this appeal.

As parties to the state court settlement, and as intended beneficiaries of the Voting Rights Act, the Minority Applicants clearly have a substantial interest in this cause, separate and distinct from that of all the other parties.[10]

It is obvious that their interests could be impaired by decisions of the three-judge court and by this Court. Each decision has, and will continue to have, a distinct impact on their voting rights guaranteed under state and federal law. The Minority Applicants must have the opportunity to participate in the proceedings out of which any injunctive orders will be generated.

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[10] It should also be noted that Judge Ramirez found on January 13, 1992, that the lower court's December 24 order, even if it met the measure of federal requirements, fell short of the Texas Bill of Rights mandate, that is, it was not protective of minority voting rights to the extent demanded by the Texas Constitution. See Appendix Attachment 5 (Further and Supplemental Findings of Fact and Conclusions of Law), 11, 12-23 (paras. 34, 40-45, 47-65).

Perhaps one of the strongest reasons favoring the Minority Applicants' request is that on January 14, 1992, the court below issued a temporary restraining order and then a preliminary injunction against them, non-parties in the Terrazas litigation, prohibiting them from doing anything further in Mena or any other litigation in any court, current or future. See Appendix Attachment 8.

That order precludes Texas courts from construing and implementing the two state equal rights provisions (Tex. Const. art. I, §3, 3a) that this Court and Texas courts have recognized as more protective than the Fourteenth Amendment. See In re McLean, 725 S.W.2d 696 (Tex. 1987); and Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 (1982); Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985).

Certainly, with such extraordinary injunctive orders issued against them, the Minority Applicants should be entitled to intervene, not only to protect themselves from possible sanctions (which Appellees already have invoked repeatedly in Terrazas[11]) but also to protect the subject matter to which the injunctive orders pertain. Due process demands no less.

D. NO PARTY TO THIS LITIGATION ADEQUATELY REPRESENTS THE MINORITY APPLICANTS' INTERESTS

Here, too, the same reasons that favored the Minority Applicants' participation in the proceedings below support their intervention in this appeal.

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[11] E.g., Motion to Enforce Preliminary Injunction, Suggestion for Sanctions Against James C. Harrington and Judith Sanders-Castro (April 4, 1992); Plaintiffs' Motion for Sanctions for Violations of Federal Rule of Civil Procedure 11 (Jan. 31, 1992); Motion for Protective Order and for Sanctions Against Judith Sanders-Castro (Jan. 24, 1992); Motion to Enforce Temporary Restraining Order and Suggestion of Contempt (Jan. 21, 1992).

Once intervention applicants demonstrate that another party's representation of their interests may be inadequate, the burden of proof on this issue shifts to those resisting intervention.[12] Securities & Exchange Comm'n. v. Dresser Indus., Inc., 628 F.2d 1368, 1390 (D.C. Cir. 1980), cert. denied, 449 U.S. 993 (1980). See also Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967). Further, the burden on the intervenor applicants to make the required showing should be treated as minimal. Trbovich, 404 U.S. at 538 n.10.

No party in this case can be said to adequately represent the interest of the Minority Applicants. With respect to the Texas Appellants, their inadequacy of representation is most clearly demonstrated by State's unhappy historical record of adopting and promoting election systems proven to be detrimental to Mexican American voters,[13] including the plans invalidated by Mena.

In addition, Texas Appellants have been implacable foes of the Minority Applicants in the lengthy and bitter battle in state court over the 1991 redistricting plans. The settlement reached between the parties under pressure of litigation cannot transform magically

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[12] Again, the Minority Intervenors would observe that none of the parties in this case filed papers opposing their third, fourth, or fifth intervention attempts in Terrazas below. And none oppose their efforts here.

[13] See, e.g., White v. Regester, 412 U.S. 755 (1973): Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc); Beare v. Smith, 321 F.Supp 1100, 1103 (S.D. Tex. 1971), aff'd sub nom. Beare v. Briscoe, 498 F.2d 244 (5th Cir. 1974); Graves v. Barnes, 378 F. Supp 640, 643 (W.D. Tex. 1974) (three-judge), aff'd in relevant part sub nom. White v. Regester, 412 U.S. 755 (1973); Cisneros v. Corpus Christi I.S.D., 324 F.Supp 599 (S.D. Tex. 1970); Garza v. Smith, 320 F.Supp 131 (W.D. Tex. 1970); United States v. Texas, 252 F.Supp 234 (W.D. Tex. 1966); Montejano, Anglos and Mexicans in the Making of Texas, 1836-1986 144 (1987); Hine, Black Victory: The Rise and Fall of the White Primary in Texas 27-28 (1979).

Appellants overnight into guarantors of the minority voting rights.

Further, the courts recognize the incongruity of depending on one's adversary for protection of contested rights as the anomaly it would be: "The [proposed intervenor] cannot be required to look for adequate representation to one who is his opponent ..." Jansen v. City of Cincinnati, 904 F.2d 336, 343 (6th Cir. 1990) quoting 7C Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, sec. 1909, at 321-23 (1986).

The Minority Applicants have different interests from the Texas Appellants in this litigation. Their interests in securing full voting rights for Mexican Americans is distinct from the State's interest in defending the particular plan drawn by the legislature, especially one drawn to serve the legislators' own interests rather than to protect minority voting rights.

As the attached chronology from the House Research Organization demonstrates (Appendix Attachment 2), the Texas Appellants fought the Minority Applicants every step of the way, from early in the legislative process, through the process of gubernatorial inaction, and all the way through the state court litigation.[14]

Only when the writing was on the wall in early December did the Texas Appellants finally enter into negotiations.

Further evidence of the Texas Appellants' hostility toward the Mena judgment, and lack of ability to protect the Mena interests,

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[14] Indeed, the Texas Defendants sought to block the temporary injunction won by the Minority Intervenors in Mena on August 22, 1991, by a direct appeal to the Texas Supreme Court. Although eventually unsuccessful, they effectively tied up the Mena litigation for nearly eight weeks, which, in turn, created the timetable justification upon which the lower court relied for its interim order.

is shown by the fact that, on February 5, 1992, they appealed the Mena judgment in its entirety to the Corpus Christi Court of Appeals (see Appendix Attachment 10). This, even though they asked the trial court to enter the judgment on January 13, 1992 which incorporated legislative action from the special session. This kind of inconsistency and perfidy, in which the Texas Appellants back away, and appeal, from a negotiated settlement shows that the Minority Applicants cannot afford to rely on the Texas Appellants to protect their interests.

The Texas Appellants cannot represent the Minority Applicants while in fact they are attacking the very judgment that the Applicants seek to protect.

Another indisputable example of the Appellants' lack of interest in minority voting rights is their failure, in this appeal, to raise fatal flaws in the district court's order adopting an interim plan and rejecting SB-1. The district court action on SB-1 was clear legal error and against the great weight of authority and should have been raised in the State's appeal. The State of Texas fails in its responsibility to raise this issue except in the limited context of Section 5 of the Voting Rights Act.

The Texas Appellants may have an interest in striving to protect their own legislatively-determined plan; but, as the history of Mena demonstrates, that interest quite often has been antithetical to the Minority Applicants. And will continue to be so in the future.

For example, if the Texas Appellants decide to enter into a settlement or make a strategic decision about whether to appeal or

not, the Minority Applicants who won the redistricting plan under attack by the three-judge court would have no party in the litigation to protect their interests. This, ironically, is the very position that the Terrazas appellees took in their mandamus action in the Texas Supreme Court, and upon which they prevailed. Terrazas v. Ramirez, 35 Tex.S.Ct.J. 256 (Dec. 17, 1991). Surely, it cannot be the rule of equity that the Minority Applicants may not settle Mena in state court without the participation of the Terrazas appellees, but the Terrazas parties can settle without the participation of the Minority Applicants.

Further, in both attempts before this Court to stay the lower court's interim election plan, the Texas Appellants did not rely upon any of the evidence before, or judgment of, the Mena trial court and declined to show that the Mena judgment was superior to the Terrazas plan and thus more fully implemented the state constitutional mandate and Congressional purpose with respect to the Voting Rights Act. Nor did they argue, as the Minority Applicants attempted to do in pleadings struck by the lower court on February 25, 1992, that the December 24 order actually was a regression in minority voting rights when compared to the Mena judgment and subsequent the legislative plan (SB-1).[15] In the

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[15] Indeed, the results of the run-off election in the Democratic primary on April 14, 1992, demonstrate the inadequacy of the Terrazas plan in contrast with the Mena plan. In the run-off election, Roman Martinez, a Mexican American candidate, was defeated by John Whitmire, an incumbent Anglo candidate, in Harris County.

Under the Mena plan, the Martinez/Whitmire contest would have taken place in District 6, in which the Hispanic population is 62.6% and the Hispanic Voting Age population is 57.1% Hispanic and which has a 31.6% Hispanic registered voting population (which, rather importantly, indicates a higher-than-usual Hispanic voter turnout).

view of the Minority Applicants, the Appellants' endeavors undermined the integrity of their judgment.[16]

Jansen, supra, supports this position. There, a group of black employees who filed suit against the city over discriminatory employment practices entered into a consent decree with the city. These employees sought and were denied intervention by the district court in a subsequent action challenging the consent decree brought by white employees. The court of appeals reversed, citing the difference in interest and the adverse history between the parties.

Trbovich, supra, also supports the notion that an intervenor seeking to protect a specific interest should be granted intervenor status when the government agency party has broader and competing interests to serve. Trbovich sought to intervene in an action

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Under the Terrazas plan, the Martinez/Whitmire contest took place in District 15, which has a smaller percentage of Hispanic population (57.1%) and Hispanic voting age population (51.5%) and Hispanic registered voters (26.0%) (which indicates a lower turnout that than District 6).

Mena District 6 has about 2,300 more Hispanic registered voters than Terrazas District 15 and, presumably, about that many less non-minority voters.

Martinez lost the run-off by 1,600 votes. Even more telling, however, is that he only missed winning the primary outright in March by 400 votes. He had 49% of the vote; and Whitmire, 46%.

Thus, the data clearly indicate that, had Martinez run from Mena District 6 rather than Terrazas District 15, he probably would have won the election as the choice of the minority community. This election result validates the interest of the Minority Applicants in preserving the Mena judgment (and SB-1).

[16] This tact is further exemplified by the representation to the court by the Texas Defendants in their January 9, 1992 Response to Emergency Application for Temporary Stay and for Definite Stay of State Court Proceedings (p.2) that they "... are not trying to convince the Court that they enjoy the state court action; law aside, an injunction from this Court might provide blessed relief from the state action" (emphasis added). These are hardly the words of parties on whom the Mena Citizens ought to be required to depend to represent rights as fundamental as the right to vote and to be free from the denial of equal protection.

brought by the Secretary of Labor under Sec. 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. sec. 482(b) to set aside an election of officers of the United Mine Workers. In reviewing the district court's denial of intervention, the Court reversed, specifically resting its decision on the competing interests the Secretary of Labor had to serve. Trbovich, 404 U.S. at 538-39.

This principle was affirmed in Smuck v. Hobson, 408 F.2d 175 (D.C. Cir 1969), in which a group of parents sought to intervene in an appeal when the Board of Education, which represented their interests below, chose not to appeal. In allowing the intervention, the court noted that the possibility that the narrow interests of the intervenor applicant may be different from those of the Board of Education, which is buffeted by conflicting public demands. Id. at 181.

Similarly in this case, the actual and potential conflicts between the Texas Appellants and the Minority Applicants preclude adequate representation of their interests and overcome any presumption of adequate government representation of the private parties' interest.

Nor is Appellant Slagle a party who will protect the Minority Applicants' interests in this litigation. Mr. Slagle's interests lie in protecting the Democratic Party, which, in the contours of this case, means protecting the incumbency interests of Democratic Texas legislators (see December 24, 1991 Summary Opinion and Judgment 24, Appellants' Appendix 48a). After all, it was the incumbent Democrats who passed the original legislative plan that

has since been invalidated by state and federal forums as violative of minority voting rights. The history of this and the Mena litigation, and the concurrent legislative negotiations, amply demonstrate that quite often the interests of incumbent Democrats are antithetical to those of the Minority Applicants.

With respect to Appellees in this case, they too have a significant conflict in representing the Minority Applicants' concerns. The driving force of Appellees' participation is to secure better legislative representation for the Republican Party of Texas. As a vehicle to get to, and remain in, court, Appellees purportedly have brought claims on behalf of minority voters. The interests of the two groups are dissimilar in many respects, as evidenced by positions taken by Appellees in this litigation with respect to the plans offered by the Minority Applicants.

For example, the Appellees bitterly fought the relief the Minority Applicants had won in state court (Mena and Quiroz). Even though the Minority Applicants ultimately had settled the Senate redistricting issues on October 7, 1991, the Appellees filed a mandamus action in the Texas Supreme Court which then stayed implementation of the negotiated Senate reapportionment plan.[17]

Further, Appellees submitted proposed redistricting plans to the lower court, which, in terms of protecting minority rights were substantially inferior to the ones adopted by the court below or

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[17] It is telling that Appellees waited to file the mandamus action until November 25, 1991, the day the Mena trial began as to the House plan (HB-150).

won in Mena.[18]

Likewise, unless the Minority Applicants are allowed to intervene, they may end up in the situation in which Appellees decide to settle (as generally happens in Texas reapportionment cases), with no input from the Minority Applicants, or simply decline to move ahead with the litigation -- both of which events would severely prejudice the Minority Applicants.

The Minority Applicants have met their burden of showing a serious possibility that their interests may not be adequately represented. "The burden [is then] on those opposing intervention to show the adequacy of the existing representation," Nuesse, 385 F.2d at 702. No such showing has been made by the parties.

The Minority Applicants have made a timely petition for intervention and have demonstrated a significant legal interest in the subject matter of this appeal. Disposition of this case in their absence would impair their interests, which no other party adequately represents. Intervention is proper under Rule 24 (a)(2).

E. ALTERNATIVELY, INTERVENTION SHOULD BE ALLOWED BECAUSE THE MINORITY APPLICANTS AND OTHER PARTIES PRESENT COMMON QUESTIONS AND THERE WILL BE NO UNDUE DELAY OR PREJUDICE TO EXISTING PARTIES

Even if they are denied intervention of right, the Minority Applicants still should be granted permissive intervention. Fed. R. Civ. P. 24(b)(2) sets forth a single criterion for permissive intervention -- a common question of law or fact. The rule further

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[18] The lower court also noted in its December 24 Summary Opinion and Judgment (Appellants' Appendix 34a) that Appellees had developed less than a complete record at the December hearing -- hardly the harbinger of adequate representation of the Minority Intervenors' interests.

specifies that, "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id.

This case clearly involves common questions of fact and law between the Minority Applicants and the other parties. The issue here is whether the redistricting plans currently in effect for Texas legislative elections, resulting from the Mena litigation concerning minority voting rights, deny or abridge the right to vote on account of race and color or in contravention of 42 U.S.C. Sec. 1973b(f)(2). The Minority Applicants are members of an ethnic and a language minority group whose rights are protected under 42 U.S.C. Sec. 1973b(f)(2).

Further, there has been no showing that intervention will delay the litigation or prejudice the rights of the parties, which is a primary consideration in the exercise of a court's discretion. Davis v. Board of School Comm'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); United States Postal Service v. Brennan, 579 F.2d 188 (2nd Cir. 1978).

While discretion in considering application of permissive intervention is broad, it is not limitless. Every factor to be considered in connection with an application for permissive intervention weighs heavily in favor of allowing intervention by the Minority Applicants.

In view of the fact that no trial date has been set, and the court below has indicated that the trial will not occur until after the November elections (Appellant's Appendix 34a), the Minority Applicants certainly have sought to intervene in a timely fashion.

In fact, the lower court allowed the intervention of Plaintiffs/Intervenors Stokes and Estrada on October 21, 1991, less than eight weeks before the December 10 hearing. Stokes and Estrada intervened much closer to the December 10 preliminary injunction hearing than the period that will certainly transpire before trial occurs, at least seven months away, if not more.

Nor are any of the current parties or the Court inconvenienced or prejudiced by allowing intervention at this juncture. This case has focused on the merits of the legislative redistricting plan won by the Minority Applicants and whether it or the lower court's plan (or a variant) is eventually adopted.

Given that the issue which the Minority Applicants bring forth is whether their plan should be entitled to the dignity accorded by principles of federalism, especially to a plan more protective of minority rights under the Texas Constitution and federal law than the Terrazas plan, that matter is postured already and introduces no heavier burden on the parties and the Court than that which they eventually must undertake in any respect.

F. CONCLUSION

For purposes of Federal Rule of Civil Procedure 24(a), the Minority Applicants have vital and indisputable interests relating to the Mena judgment that Appellees seek to avoid and they are so situated that the disposition of this matter, as a practical matter, will impair and impede their ability to protect those interests. Their interests are not now adequately protected or represented by the existing parties to this appeal.

For purposes of Rule of Civil Procedure 24(b), the interven-

tion of the Minority Applicants would not at all unduly delay or prejudice the adjudication of rights of the original parties.

III. THE THREE-JUDGE COURT WRONGLY USED THE VOTING RIGHTS ACT IN DEROGATION OF RELIEF AFFORDED UNDER STATE CONSTITUTIONAL EQUAL RIGHTS GUARANTEES THAT MORE ADEQUATELY PROTECTED MINORITY VOTING RIGHTS THAN THE PLAN PROMULGATED BY THE THREE-JUDGE PANEL

The lower court wrongly used the Voting Rights Act in derogation of relief afforded under state constitutional equal rights guarantees (Tex. Const. art. I, secs. 3, 3a) that more adequately protected minority voting rights than the Terrazas plan.

A survey of the Mena (SB-1) and Terrazas plans shows clearly that the former is more protective of minority voting rights.

SENATE "HISPANIC" REDISTRICTING COMPARISONS

MENA PLAN (SB-1)			TERRAZAS PLAN		
District	H-VAP[19]	H-REG[20]	District	H-VAP	H-REG
6 (Harris)	57.1%	31.6%	15	51.5%	26.0%
19 (Bexar)	58.2%	50.1%	24	54.2%	48.0%
20 (Nueces)	57.1%	50.5%	20	57.9%	50.9%
21 (Webb)	59.0%	52.6%	21	58.7%	50.0%
26 (Bexar)	59.7%	51.1%	19	56.3%	48.6%
27 (Hidalgo)	78.6%	66.9%	27(Cameron)	76.9%	64.3%
29 (El Paso)	67.3%	49.9%	29	67.1%	49.8%

SENATE "AFRICAN AMERICAN" DISTRICT COMPARISONS

MENA PLAN (SB-1)			TERRAZAS PLAN		
District	B-VAP[21]	B/H-VAP[22]	District	B-VAP	B/H-VAP
13 (Harris)	50.3%	62.4%	13	57.2%	71.2%
23 (Dallas)	46.3%	68.9%	23	46.0%	68.9%

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[19] Hispanic voting age population.

[20] Hispanic registered voters.

[21] Black (African American) voting age population.

[22] Combined Black and Hispanic voting age population.

SENATE "IMPACT"[23] DISTRICT COMPARISONS

MENA PLAN (SB-1)		TERRAZAS PLAN	
District	B/H-VAP	District	B/H-VAP
12 (Dallas)	32.1%	12	48.5%
15 (Harris)	41.6%	6	28.8%

Thus, the trial court erred in supplanting the Mena plan (SB-1) with its own and, in so doing, violated well-settled principles of federalism as discussed in the following sections.

IV. THE DISTRICT COURT MADE WHOLLY ERRONEOUS FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS WITHOUT EVEN CONDUCTING AN EVIDENTIARY HEARING THEREON

This motion to intervene is appropriate since Intervenors have an unique interest in this litigation. The State of Texas seeks to protect its own legislation. The Terrazas appellees seek to protect partisan gains achieved from the trial court. Only the Minority Applicants seek, exclusively, to protect minority voting interests. The Minority Applicants secured an important victory in Texas state courts, significantly enhancing minority voter potential for the Texas Senate elections. Yet, the trial court undermined these achievements while denying the Minority Applicants an opportunity to participate.

Moreover, the State of Texas does not and cannot adequately protect the minority communities' interest in these proceedings. A glaring example of the State's lack of interest in minority voting rights is its failure in this appeal to raise fatal flaws in the district court's order adopting an interim plan and rejecting

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[23] Although not yet defined by the Supreme Court, for purposes of comparison, we use 40%+ minority to define an "impact district."

SB-1. The trial court erroneously and without justification found SB-1 "fails to satisfy the Section 2 requirements of the voting rights act." Order and Judgment, January 10, 1992, Appellants' Appendix 13a.

The district court action on SB-1 was clear legal error and against the great weight of authority and should have been raised in the State's appeal. Moreover, the trial court erred by its failure to follow clear and unambiguous precedent, establishing the narrow grounds for adoption of an interim court plan.

Again, the State of Texas failed in its responsibility to raise this issue except in the limited context of Section 5 of the Voting Rights Act. The district court, however, acted contrary to established law whether it was acting exclusively as a Section 5 court or a court reviewing state redistricting plans pursuant to the Fourteenth Amendment and Section 2 of the Voting Rights Act. The Minority Applicants seek to raise these critical errors in the lower court's orders through this intervention.

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING SB-1 (MENA) FAILED TO MEET THE REQUIREMENTS OF SECTION 2

This case involves the implementation of an interim court-ordered redistricting plan over a legislatively-enacted redistricting plan where no trial or hearing challenging the legislative plan has been held and where the legislative plan had been reviewed and precleared pursuant to Section 5 of the Voting Rights Act. 42 U.S.C. §1973c. The trial court gratuitously held that the legislatively-enacted plan (SB-1) failed to meet the requirements of VRA Section 2. Order and Judgment (January 10, 1992), Appellants' Appendix 13a. Yet, the district court failed to inquire into the

facts that would support such a finding and failed to comport its findings with the legal requirements for an analysis of minority vote dilution detailed in Thornburg v. Gingles, 478 U.S. 30 (1986).

The clearly-erroneous test of Rule 52(a) normally is the appropriate standard for appellate review of a finding of vote dilution. Rogers v. Lodge, 458 U.S. 613, 622-27 (1982). However, Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a "mixed" finding of law and fact, or a finding of fact predicated on a misunderstanding of the governing rule of law. Bose Corp. v. Consumer Union of U.S., Inc., 466 U.S. 485, 501 (1984). Here, the trial court failed to inquire into any of the factual requisites delineated by Thornburg to determine a finding of minority vote dilution.

Thornburg established a three-pronged test for evaluating claims of minority vote dilution. 478 U.S. at 50-51. First, the minority group making the claim of vote dilution must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.[24] Id. at 50. Second, the minority group must be able to show it is politically cohesive. Id. at 51. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Id. at 51. Examination of racial bloc voting is a key element of a vote dilution claim. Id. at 55. The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain

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[24] In Terrazas, the Republican Party of Texas is purporting to make its claims under Section 2 on behalf of African American and Mexican American voters of Texas.

whether minority group members constitute a politically cohesive unit and to determine whether Anglos vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Id. at 56. Finally, in a single-member district context, it is important to examine the impact of the actual boundaries in cohesive minority community neighborhoods. Id. at 46 n.11. Therefore, a court should examine whether districts in a districting plan have fragmented or packed cohesive minority populations. Id.

These clear, unambiguous legal standards for reviewing a voter dilution claim were ignored by the district court. Rather than examine SB-1 for the impact of racially polarized voting on its districts or to determine if Anglo bloc voting would frustrate minority electoral potential in SB-1 minority districts, or to examine SB-1 for fragmentation or packing, the lower court chose to reject SB-1 because it came to the erroneous "conclusion [that] having reviewed the Senate plan...[this court] sees no indication that the Senate is attempting to devise a plan that would enhance minority voting strength over that provided in this Court's interim plan." Order and Judgment, January 10, 1992, Appellants' Appendix 5a. The court made this finding without an evidentiary hearing.

In its analysis, the trial court compared Mena/SB-1 minority districts to the Terrazas interim minority districts. The major difference the court found was that, although both plans provided nine minority districts, only the district court's plan provided an impact minority district. The district stretching from Mexican American neighborhoods in South Dallas through Anglo neighborhoods

to mixed minority neighborhoods in Fort Worth was District 12.[25] Id. Yet, nothing in the record or in the lower court's order evidences any cohesion between Hispanics in Dallas and African Americans and Hispanics in Fort Worth.[26] Moreover, no analysis of Mena/SB-1 is made to determine whether fragmentation of minorities occurred. The only packing of minority population in Mena/SB-1 intimated by the court was in District 27 where Hispanics comprised 83.1% of the population generally and 78.6% of the voting age population. Id. at p. 6. Yet, the interim plan draws District 27 with 81% Hispanic population and 76.9% Hispanic voting age population ("VAP"). Thus, if District 27 in Mena/SB-1 is packed at 78.6% Hispanic VAP, so it must also be packed at 76.9% Hispanic VAP in the court's interim plan. Id. In describing the various minority districts in each plan, the trial court attempts to justify its preference for its own plan over Mena/SB-1. Where the court plan's minority districts have slightly larger minority populations, the district court characterizes them as "stronger." Id. For instance, the court finds its Districts 20 and 21 with 59.7% Hispanic VAP and 59.4% Hispanic VAP, respectively, are "stronger" than Mena/SB-1

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[25] Although District 12 has a combined minority voting age population of 48.5%, SB-1 has a minority "impact" district in Harris County not contained in the court's interim plan. District 15 in SB-1 has a combined minority voting age population of 41.6%.

[26] Ironically, this same district court in Overton v. City of Austin rejected claims of minority voter cohesion between African Americans and Mexican Americans in Austin where statistical evidence showed Mexican Americans supported Black-preferred candidates at a 73% rate and African Americans supported Mexican American preferred candidates at a 69% rate. See 871 F.2d 529, 536 (5th Cir. 1989). Yet, here, without any evidence of dual minority cohesion, the district court rejected Mena/SB-1 and preferred a combined minority impact district stretching over two distinct counties.

Districts 20 and 21 with 57.9% and 58.2% Hispanic VAP, respectively. Yet, the trial court ignores the fact that, with respect to District 21, Hispanic voter registration is actually higher in Mena/SB-1 (53%) than in the court's interim plan (50%). In fact, the trial court ignores altogether Hispanic registration as a measure of minority voting strength of a district and it is not difficult to understand why. Mena/SB-1 contains 6 majority Hispanic registration districts, the Terrazas plan has only 4[27]:

Mena/SB-1 Plan		Terrazas Interim Plan	
District	% Hispanic Registered Voters	Comparable District	% Hispanic Registered Voters
21	52.6%	21	50.0%
19	50.1%	24	48.0%
26	51.1%	19	48.6%
20	50.5%	20	50.9%
27	66.9%	27	64.3%
29	49.9%	29	49.5%

The superior protections of Mena/SB-1 over the court's plan with respect to minority voter interests is also shown from examining other districts. In Harris County, for example, the Terrazas interim plan reduces the Hispanic voter registration proportion of the new "Hispanic" district by 6%. District 6 in Mena/SB-1 is the new Harris County Hispanic Senate District; it compares to District 15 in the Terrazas plan:

	Mena/SB-1 Dist. 6	Terrazas Plan Dist. 15
% Hispanic population	62.6%	57.1%
% Hispanic VAP	57.1%	51.5%
% Hispanic registered voters	31.6%	26.0%

The court's plan, thus, weakens the so-called Hispanic district in Harris County to the point where an Anglo incumbent has

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[27] District 29 is counted as a 50% Hispanic registered district for both plans.

a greater chance of success, which indeed is what occurred in the March primary and April run-off (see n.15 above). Finally, the District Court admits that both plans contain two "Black districts." Order and Judgment, January 10, 1992, pp. 7-8.

Thus, even if the appropriate measure for review of Mena/SB-1 for compliance with Section 2 was comparison with the Terrazas interim plan, Mena/SB-1 could not have been found to "fail the requirements of Section 2" since it provides greater protection to minority voters than does the interim plan.

Another reason for the district court's rejection of Mena/SB-1 appears not to be minority voter dilution at all, but rather "time-consuming partisanship." Order and Judgment, January 10, 1992, Appellants' Appendix 8a. The lower court improperly rejected the partisan advantage gained in Mena/SB-1 as a basis for using its own plan. Id. Disturbingly, however, the trial court had earlier found that the Republican Plaintiffs had failed to make a partisan gerrymandering case as required by Davis v. Bandemer, 478 U.S. 109 (1986). Summary Opinion and Judgment, December 24, 1991, Appellants' Appendix 34a. Under any circumstance, however, it is clear that the lower court did not review Mena/SB-1 for minority vote dilution pursuant to the appropriate legal standard as articulated in Thornburg, and should not have brushed aside Mena/SB-1 in favor of its own inferior plan. The orders of December 24, 1991 and January 10, 1992 should be reversed.

B. THE LOWER COURT ERRED AS A MATTER OF LAW BY IMPOSING ITS OWN PLAN OVER THE LEGISLATIVELY ENACTED AND APPROVED SB-1

The trial court also erred by ignoring clear legal principles

established to guide courts in substituting their plans for legislatively-enacted redistricting plans. The district court failed to abide by the principle that reapportionment is primarily the duty and responsibility of the state legislature rather than that of a federal court. Reynolds v. Sims, 377 U.S. 533, 587 (1964).

More-over, the trial court ignored the rule that it errs if it overrides state apportionment policy without solid constitutional or equi-table grounds. White v. Weiser, 412 U.S. 783, 796 (1973).

Thus, when fashioning a temporary plan, the district court should not have preempted the legislative task or "intrude[d] upon state policy any more than necessary." Whitcomb v. Chavis, 403 U.S. 124, 160 (1971). The trial court, in fact, chose to proceed with its own plan over one that better protected minority voting interests and was a legislatively enacted plan in order to ensure that primary elections would proceed as scheduled. Yet, a state district court in Hidalgo County, Texas in Mena v. Richards had already cleared the way to ensure that SB-1 could proceed without interrupting the scheduled March primary elections. Final Judgment, January 13, 1992, Appendix Attachment 3. Moreover, the State, through legislation, had made a policy choice that proceeding with SB-1, even if a new primary date was necessary, was preferable than proceeding with the interim court plan.

The lower court chose to proceed with its own plan rather than defer to the legislative plan because the Court plan "enhanced minority voting rights to a greater degree than provided in a Quiroz-

style plan [Mena/SB-1]."[28] However, even were this rationalization true, which it is not, it hardly rises to the level of the "solid constitutional or equitable grounds" necessary to brush aside state reapportionment policy. White v. Weiser, supra.

In the 1980 re-districting process, for example, a three-judge court in Texas refused to reject wholesale the legislative redistricting enactment even though it had failed Section 5 preclearance. Terrazas v. Clements, 537 F.Supp. 514, 540 (N.D. Tex., Dallas Div., 1982), stay denied, 456 U.S. 902 (1982). Instead of making whole-sale changes, the district court, in the 1980 litigation, began with the legislative enactment of the Legislative Redistricting Board plan, and adopted plans for only two counties proposed by minority plaintiffs to enhance minority voting strength and in which the Department of Justice had specifically found objections under Section 5. Id. Here, the trial court not only refused to use Mena/SB-1 as a base, but also ignored the wholesale alteration of the state apportionment policy caused by its own plan. Order and Judgment, January 10, 1992, Appellants' Appendix 13a-15a.

The lower court erred by failing to abide by clearly established principles governing the appropriate circumstance for implementation of court-ordered interim redistricting plans; its orders should be reversed.

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[28] Because Quiroz v. Richards adopted a revised Senate redistricting plan before Mena, "Quiroz" is sometimes used, especially by the lower court, to encompass the Mena litigation. Mena and Quiroz produced, and then ratified, the 1992 revised Senate reapportionment plan (SB-1).

V. ARGUMENT AS TO LEGAL IMPROPRIETY OF TERRAZAS INJUNCTION AGAINST TEXAS STATE COURT ACTION

A. INTRODUCTION

The January 14, 1992, preliminary injunction (Appendix Attachment 8) issued by the Terrazas panel enjoining further activity in the Mena litigation (or any similar litigation, for that matter) effectively transferred from the Texas state courts to a federal court the entire responsibility for reviewing challenges to Texas' legislative districts. That injunction undercuts the federal system of justice, of which the state courts play an essential role. If a federal district court may preempt and enjoin a state court from construing and implementing a state redistricting law, only the federal courts will be left to construe and define state policy on redistricting. This would be true not only of Texas but of all fifty States as well.

Texas was one of the first States to have a state court review its 1991 legislative redistricting plan a process encouraged by Scott v. Germano, 381 U.S. 407 (1965) (per curiam). This reflects a trend begun a decade ago when state courts considered about one-third of nearly 90 challenges to legislative or congressional redistricting plans during the 1980s. See National Conference of State Legislatures, Reapportionment Update (April 1987). If the trend toward state court involvement in redistricting continues in the 1990s' round of redistricting litigation, many more cases will be filed in the state courts, than in federal court. The lower court's preemption and injunction would reverse that legitimate and desirable trend.

B. THE DISTRICT COURT'S PRELIMINARY INJUNCTION OF ALL STATE COURT PROCEEDINGS VIOLATES THE ANTI-INJUNCTION ACT

The Terrazas court did not have authority to preempt and enjoin the state court redistricting action. Its order exceeds the boundaries established by Congress for the country's dual federal and state court systems and intrudes upon the jurisdiction of the Texas and its courts in derogation of rights of the State's minority community.

The sole reason that the panel gave for using the preliminary injunction was that "confusion ... might result with the issuance of state district court orders that conflict or interfere with the orders entered by this Court ...." Preliminary Injunction, Appendix Attachment 8, p.2. This speculative finding was not based on an evidentiary hearing, and the order recited no case authority.

Congress recognized the limits on federal court authority to enjoin state courts when it enacted the Anti-Injunction Act (28 U.S.C. § 2283), which embodies the constitutional requirement of joint sovereignty that includes a federal government and judiciary with limited powers as found in the Tenth Amendment. Gregory v. Ashcroft, 111 S. Ct. 2395, 2399-2402 (1991).

When a reapportionment issue is a state constitutional prerogative, the Tenth Amendment controls; and the state retains responsibility. Sugarman v. Dougall, 413 U.S. 634, 648 (1973). Further, to protect the "Republican Form of Government" guaranteed by the U.S. Constitution (Article IV, § 4) elected state judges should review the apportionment plan passed by the legislature barring any exclusive jurisdiction for the federal court.

The Anti-Injunction Act establishes a general prohibition

against federal court interference with state court proceedings.

The exceptions contained in the Anti-Injunction Act are "narrow and are not [to] be enlarged by loose statutory construction." Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988), quoting Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970). The Act does not convey "a broad general policy for appropriate ad hoc application," but rather is "a clear-cut prohibition qualified only by specifically defined exceptions." Id. at 287, quoting Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 515-16 (1955). If a federal court's power to enjoin a state court action is in doubt, the federal court should not intrude upon the state court's authority. Atlantic Coast Line R.R., 398 U.S. at 297.

The Terrazas court, without citing any authority, concluded that an injunction of the state court redistricting action was necessary because competing judgments might cause "confusion". It recognized that the state court's orders might be inconsistent with its orders and held that such a situation should not continue.[29] Rather than defer to the state court's exercise of concurrent jurisdiction, see Scott v. Germano, 381 U.S. at 409, the federal court concluded it was necessary to enjoin the state court.[30]

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[29] The risk of inconsistent orders existed from the time the federal action was filed in May 1991. On August 2, 1991, the trial court denied a motion to enjoin the state court action. However, the court reversed this position and issued its injunction in the very late stages of the state redistricting litigation without any notice, hearing, or additional briefing.

[30] In enjoining the state court proceeding, the federal court apparently assumed that it had exclusive jurisdiction over challenges under section 2 of the Voting Rights Act, 42 U.S.C. § 1973. This assumption was erroneous, as state courts have concurrent

The "aid of jurisdiction" exception to the Anti-Injunction Act is extremely narrow and applies almost exclusively to in rem proceedings or to cases where a state court action "would interfere with ongoing federal oversight of a case, such as school desegregation orders." 1A pt. 2 J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, Moore's Federal Practice § .209[2] at 2340 (2d ed. 1991). This narrow exception does not apply simply because parallel actions are proceeding in both federal and state courts, even where resolution of the matter by both courts would be inconsistent and unworkable. Atlantic Coast Line R.R., 398 U.S. at 295-96; Phillips v. Chas. Schreiner Bank, 894 F. 2d 127, 132 (5th Cir. 1990); Texas v. United States, 837 F.2d 184 (5th Cir. 1988).

Moreover, a federal court lacks authority to enjoin the state court action even where the state action interferes with the federal action. A federal court "does not have inherent power to ... enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakenly clear." Atlantic Coast Line R.R., 398 U.S. at 294. Instead, the issue should be raised in the state court action and that court should determine the limits of its own jurisdiction. Chick Kam Choo, 486 U.S. at 149-50 (when "a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court").

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jurisdiction over such claims. See Hathorn v. Lovorn, 457 U.S. 255, 269 (1982); see also Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981) (concurrent state court jurisdiction presumed absent provision by Congress to the contrary or disabling incompatibility).

The Terrazas court exceeded its authority in issuing an injunction against the Texas state court redistricting action. Its order should be reversed.

C. THE DISTRICT COURT'S REFUSAL TO DEFER TO THE STATE COURT ACTION VIOLATES THE DOCTRINE ESTABLISHED IN SCOTT V. GERMANO

The lower court's injunction not only exceeds its authority and violates principles of comity but also contravenes the mandate of Scott v. Germano, which made clear that the exceptional nature of redistricting requires federal courts to defer to state reapportionment efforts, including those undertaken by a state judiciary:

> The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate actions by the States in such cases has been specifically encouraged.

381 U.S. at 409.

Germano states a broad rule of deference to states and state courts in redistricting matters which extends to the circumstances of this case.[31]

In Germano, parallel challenges to the redistricting plans for the Illinois legislature were brought in state and federal court. Before the state court even began to work on a valid redistricting plan, the state defendants asked the federal court to stay its

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[31] It should be noted that the Circuit Judge sitting on the Terrazas panel recognized the federalism concerns at stake when he dissented from the December 24 interim order because he believed that deference should be given to the legislative process and Texas courts to address the reapportionment ills highlighted by the court before the federal panel imposed its own interim plan (Summary Opinion and Judgment 27), citing McDaniel v. Sanchez, 452 U.S. 130, 150 n.30 (1981). Appellants' Appendix 51a.

He restated his dissent in even stronger terms to the panel's supplemental Order and Judgment (10) of January 10, 1992.

proceedings. The federal court refused to defer to the parallel state proceedings, in part because the federal action had been filed before the state action had reached the merits. Germano v. Kerner, 241 F. Supp. 715, 719 (N.D. Ill.), vacated sub nom. Scott v. Germano. On direct appeal, this Court ordered the federal court to stay its hand unless and until it became clear that the state court would be unable to develop a plan before the election. Germano, 381 U.S. at 409-10.[32]

Deference to state redistricting efforts in this case is even more appropriate than the deference required in Germano. The Texas state court had assumed jurisdiction and rendered a final judgment which would have been implemented but for the federal court stay. Despite the federal court's contentions to the contrary, it was clear that the agencies of Texas, including the Supreme Court of Texas, would have been able to approve a redistricting plan in time for the 1992 elections. The state court action, which was filed months before the federal action, proceeded rapidly. The state court completed its substantive work in late November and issued a final redistricting order on January 13, 1992. That judgment would have been reviewed immediately by the Texas Supreme Court, had the state defendants appealed. Tex. Const. art. V, §3-b; Tex. Govt Code §22.001(c) (Vernon 1988). The federal court injunction, how-

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[32] Federal courts repeatedly have recognized the clear abstention requirement set forth in Germano and have deferred to parallel state court redistricting actions. E.g., Bianchi v. Griffing, 393 F.2d 457, 461 (2d Cir. 1968); Badham v. March Fong Eu, 568 F. Supp. 156, 158 (N.D. Cal.), aff'd sub nom. Badham v. United States Dist. Court, 721 F.2d 1170 (9th Cir. 1983); Avens v. Wright, 320 F. Supp. 677, 686 (W.D. Va. 1970); Mahoney v. Burkhardt, 299 F. Supp. 787, 789 (D. N.J. 1969).

ever, disrupted the timely and orderly operation of Texas' judicial system, stopping it in its tracks.

This Court has expressed approval of state court review of legislative redistricting plans:

> We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes.

Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 674 (1964), citing a Kansas Supreme Court redistricting decision as a "commendable example of an exercise of judicial responsibility by a state court." Id. at 674 n.18 (citing Harris v. Shanahan, 192 Kan. 183, 387 P.2d 771 (1963).

The state court must be given an opportunity to formulate and approve valid redistricting plans without interference from the federal courts. See, e.g., 17 A.C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4247, at 127.

No one disputes that redistricting is essentially a legislative function and that the judiciary, both state and federal, should give appropriate deference to the Legislature. What is at issue here, however, is the proper relation between Texas state and federal courts. This Court has emphasized that the federal courts must give the utmost deference to the state courts where redistricting matters are at stake. The trial court has not only refused to defer to the courts of Texas, it has prevented the state court from carrying out the very role this Court has encouraged state courts to undertake. The lower court's order violated the important prin-

ciple established by Scott v. Germano and should be vacated.[33]

D. THE STAY IS NOT AUTHORIZED BY 28 U.S.C. §1651(a)

Nor would the All Writs Act, 28 U.S.C. § 1651(a), apply to this case.

The Act permits a federal court to issue writs to protect its own judgments or its own orders. See, e.g., Pennsylvania Bureau of Correction v. United States Marshals Service., 474 U.S. 34, 40-43 (1985). The purpose and office of the Act is to protect already issued judgments or orders about to be issued. Baker v. Gotz, 415 F. Supp. 1243, 1247 (D. Del.), aff'd, 546 F.2d 415 (3d Cir. 1976). The phrase "in aid of" does not vest or create a general restraining power in the federal courts.

As this Court noted in Kline v. Burke Construction Co., 260 U.S. 226, 230 (1922):

> [A] controversy is not a thing, and a contraversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case.

In reversing an injunction granted under the All Writs Act, Kline quoted with approval from Baltimore & Ohio R.R. v. Wabash

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[33] Interestingly, throughout the course of the Mena proceedings the state district court deferred to the state legislature to correct the deficiencies the court found. The Terrazas court made no such deference at all, although Judge Garwood did dissent on that point.

R.R. Co., 119 Fed. 678, 680-81 (7th Cir. 1902), cert. denied, 187 U.S. 650 (1903):

> It is settled that, when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted .... The rule is not only one of comity, to prevent unseemingly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.

260 U.S. at 231.

This is not a case where federal court judgment has been entered and the state court seeks to prevent its enforcement. See, e.g., Travia v. Lomenzo, 381 U.S. 431 (1965). Rather, the state court acquired jurisdiction first, held four evidentiary hearings, a trial, undertook painstaking and detailed review of varied legislative plans, reached judgment, and entered injunctive orders before the lower court acted.[34]

In this case, there was no need for injunctive relief to protect the federal court's jurisdiction. To the extent that the federal court has jurisdiction over the subject matter of state legislative redistricting, it is concurrent with that of the Texas state courts. See Scott v. Germano. Concurrent federal jurisdiction will not disappear based upon any state court order. On the other hand, granting a preliminary injunction against implementa-

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[34] During the course of Mena v. Richards, the Texas Supreme Court also twice reviewed the action.

By contrast, the Terrazas court held only one hearing, and that for a preliminary injunction, which the court set for hearing sua sponte on its own motion without the request of any party.

tion of the state court judgment defeats the very concept of concurrent jurisdiction.

Issuance of a preliminary injunction below was not "agreeable to the uses and principles of law." 28 U.S.C. § 1651(a). Nor to the principles of comity or federalism. It is not agreeable to the principle set forth in Scott v. Germano, 381 U.S. at 409, and not consistent with the concept of concurrent jurisdiction. It would not permit even the Texas Supreme Court to order implementation of the trial court's final judgment.

The Texas state court judgment in Mena does not seek to interfere with or impede the imposition or effectuation of any federal court plan. The "principle of federalism" to which the court below gave no attention would require only that the federal court stay its hand until "the appropriate agencies of the State ... including its Supreme Court, may validly redistrict ...." Scott v. Germano, 381 U.S. at 409. In this case, the temporary injunctive order of the district court should be vacated and the case remanded with instructions that the trial court retain jurisdiction pending immediate action by the Texas appellate courts. See Scranton v. Drew, 379 U.S. 40 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. at 674.

D. CONCLUSION

This preliminary injunction affects not only a state court in Texas, but state courts throughout the country that are undertaking the 1990s round of redistricting. If this preliminary injunction is allowed to stand, it will discourage all state courts from becoming involved in redistricting and throw the entire burden on

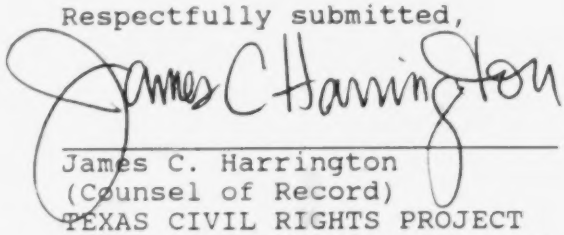
the federal courts. Every appeal of a district court decision will go straight to this Court, bypassing the State's own highest court. This is completely at odds with this Court's oft-repeated concern for the role of state courts in our federal system. The preliminary injunction should be vacated forthwith.

PRAYER FOR RELIEF

THEREFORE, the Minority Intervention Applicants respectfully pray that the Court allow them to intervene in this appeal.

Dated: May 11, 1992.

Respectfully submitted,



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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 91-1270

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, Governor of Texas, *et al.*,
Appellants,

v.

LOUIS TERRAZAS, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Western District of Texas

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MOTION FOR ESTABLISHMENT OF FIFTEEN-DAY DEADLINE FOR SUBMISSION OF THE VIEWS OF THE UNITED STATES

Ann Richards, Dan Morales, and John Hannah, Jr., respectively the Governor, the Attorney General, and the Secretary of State of Texas (appellants herein and hereinafter collectively termed "the state"), move the Court to establish a deadline of fifteen days for the Solicitor General to give the Court the views of the United States in this case. The grounds follow:

1. As events unfold in other forums or contexts dealing with the subject matter of this appeal -- Texas Senate redistricting for 1992 -- the likelihood of voter confusion and electoral uncertainty grows. Prompt guidance from this Court is the only readily apparent path toward eliminating the potentially debilitating uncertainty and confusion. The first crucial step toward prompt guidance is for the United States to promptly file the views which the Court requested on March 30, 1992. Thus far, the Court has set no deadline for the submission of such views. Setting the deadline requested here would insure that the views are available to the Court before it goes into summer recess in little more than a month.[1]

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[1] On May 18, 1992, the Court also invited the United States's views in the related case of *Slagle v. Terrazas*, No. 91-1546, in which the state also is a party.

2. The just-referenced unfolding events are outlined below:

a. On May 15, 1992, the Judicial Council of the Fifth Circuit[2] unanimously ordered the public reprimand of Judge James R. Nowlin for his improper actions in this very case. Judge Nowlin is the managing judge and was a determinative vote in the two-to-one decision before the Court in this appeal. The Judicial Council's order of reprimand and the special committee report whose findings, conclusions, and recommendations the Fifth Circuit Council adopted are attached and incorporated in this motion. Among the most important parts of the reprimand and report is the following passage, which is a precise restatement of the governing test for judicial disqualification under 28 U.S.C. § 455(a):

> For a judge of the court panel faced with resolving this controversy to privately call upon an elected member of the legislature for assistance in that task, regardless of how limited, would ***clearly have the appearance of impropriety for any reasonable observer.***

Order of May 15, 1992, Report at 25 (last sentence) (emphasis added). *Compare. Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194, 2202-03 (1988); *In re Contintental Airlines Corp.*, 901 F.2d 1259, 1262 (5th Cir. 1990) (§ 455(a)'s standard is "an objective one, that if a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality' ") The Fifth Circuit council in its one-page order explicitly found the conduct of Judge Nowlin to be "inconsistent with the mandates of Canons 2A and 3A(4) of the Code of Conduct for United States Judges and . . . prejudicial to the effective administration of the business of the courts."

b. In *In re Slagle*, No. 91-1841, this Court is presented with the question of whether it or the Fifth Circuit has jurisdiction to decide whether a writ of mandamus should issue requiring Judge Nowlin to recuse himself from the

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[2] The Judicial Council of the Fifth Circuit is composed of ten currently sitting, active members of the Fifth Circuit and nine currently active, sitting district judges in the Circuit. One of the appellate judges recused himself.

Texas Senate redistricting case (as well as two related Texas redistricting cases). The *Slagle* case arrived here through the rarely-invoked certified question procedure after the Fifth Circuit was asked to effectively overrule Judge Nowlin's denial of the State's and Slagle's motions for his recusal, which motions arose out of the facts forming the basis for the public reprimand noted in ¶ 2.a, above.

c. The case from which this appeal arises, *Terrazas v. Slagle*, Civ. Action No. A-91-CA-426, still pends below. Despite the public reprimand of May 15th and the finding quoted in ¶ 2.a, above, Judge Nowlin has not yet recused himself. Yet, there is a strong possibility that the three-judge district court panel will be faced with a crucial decision in the relatively near future because the preliminary injunction has expired by its own terms (with the conclusion of the state party primaries on April 14, 1992) and the state (at least as of today) has no precleared Senate redistricting plan of its own to implement for the Senate general elections, which formally commences with the opening of personal appearance early voting on October 14, 1992. That is, as things now stand and without further judicial action, the state is faced with uncertainty about whether there is any authority for it to go forward with the Senate general elections. It may very well be that the district court below in *Terrazas v. Slagle* may be called upon to act on the merits on questions pertaining to Senate redistricting before this Court convenes to open its 1992 term on October 5, 1992 (only nine days before voting formally opens for general election voting for the Texas Senate). Judge Nowlin's possible role in such action remains unknown but his refusal thus far to recuse himself, notwithstanding the clear language of the public reprimand, raises the probability that he will continue to play an active role in this case.

d. The Attorney General of the United States, through his Assistant Attorney General for Civil Rights, has refused to grant section 5 preclearance to the Texas legislature's previously-precleared Senate redistricting plan, offering as his

sole ground the global, undifferentiated finding of a section 2 violation in the order before the Court in this appeal. As a consequence of the United States Attorney General's preclearance denial, a three-judge panel of the United States District Court for the District of Columbia is hearing the section 5 preclearance case of *Texas v. United States*, No. 91-2383, which is proceeding toward trial (formal discovery having ended on May 15, 1992). As posed by the district court, the issue to be tried in that case has devolved into which of two Senate redistricting plans (the Texas Legislature's or the *Terrazas* court-ordered interim plan now before this Court) offers superior protection to minority voters in Texas. *See Texas v. United States*, 785 F.Supp. 201 (D.D.C. 1992).

3. The status quo threatens chaos for Texas Senate general elections. Requiring the United States to offer the Court its views within the next fifteen days makes it at least possible for the Court to summarily address the merits of this case before it breaks for the summer. The consequence of the Court's not doing so is that the state and its voters must spend the summer wrestling with the specter of not having any state Senate general election this fall, or that there will be such an election but only as a result of a federal court order issuing in part from a federal judge who has already been told by his peers on the judicial council that his participation denies the appearance of fairness and propriety to judicial decrees. The state urges the Court to help it avoid either of these consequences and, as a first step in this direction, imposing a fifteen-day deadline on the United States to tell the Court what it thinks of this case.

Based upon the foregoing matters, the state urges the Court to grant this motion.

Respectfully submitted,

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May 20, 1992

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

Before: Henry A. Politz, Chief Judge; Carolyn Dineen King, Will Garwood*, E. Grady Jolly, Patrick E. Higginbotham, John M. Duhé, Jr., Jacques L. Wiener, Jr., Rhesa H. Barksdale, Emilio M. Garza, and Harold R. DeMoss, Jr., Circuit Judges; Morey L. Sear, John V. Parker, F. A. Little, Jr., Neal B. Biggers, Jr., Henry T. Wingate, Mary Lou Robinson, George P. Kazen, William Wayne Justice, and H. F. Garcia, District Judges.

IN RE: The complaint of Lewis H. Earl against United States District Judge James R. Nowlin under the Judicial Conduct and Disability Act of 1980.

U.S. COURT OF APPEALS
FILED
MAY 15 1992
CLERK

ORDER

After due consideration of the attached report of the investigative committee appointed in this matter, and the evidence upon which that report is based, the Council adopts the committee's findings and conclusions and approves and accepts its recommendation for the disposition of this complaint. For reasons stated in the report, the Council reprimands Judge Nowlin for his conduct. It further admonishes Judge Nowlin that his actions described in the report are inconsistent with the mandates of Canons 2A and 3A(4) of the Code of Conduct for United States Judges and are deemed prejudicial to the effective administration of the business of the courts. It is imperative that Judge Nowlin exercise greater care in such matters in the future and he is so directed.

FOR THE COUNCIL

Henry A. Politz
Chief Judge, Fifth Judicial Circuit

May 15, 1992

* Recused

UNITED STATES COURT OF APPEALS
Fifth Circuit

DATE: May 5, 1992

TO: The Fifth Circuit Judicial Council

SUBJECT: Report of Special Committee of the Fifth Circuit Judicial Council on Complaint of Lewis H. Earl against Judge James R. Nowlin

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I. Background

Lewis H. Earl of Post, Texas, filed a complaint on January 21, 1992, with the Fifth Circuit Judicial Council against Judge James R. Nowlin. On February 5, 1992, Chief Judge Henry A. Politz dismissed the complaint. On February 10, however, the Chief Judge vacated his earlier order and directed that the complaint be investigated by a special Committee. As required by 28 U.S.C. § 372(c)(4)(A), the Chief Judge appointed himself and an equal number of circuit and district judges to the Committee, appointing Circuit Judges W. Eugene Davis (Chairman) and Harold R. DeMoss, Jr.; and District Judges William Wayne Justice and George P. Kazen.

The charge against Judge Nowlin relates to his conduct while serving as a member of a three-judge district court empaneled to preside over consolidated lawsuits, bearing docket numbers A-91-CA425, 426, and 428, commonly referred to as the Terrazas litigation. The Terrazas plaintiffs seek to reapportion the Texas legislature because of alleged violations of the Voting Rights Act and the Constitution.

The Terrazas suits were filed in May 1991 and were lodged in Judge Nowlin's division. At Judge Nowlin's request, then-Chief Judge Charles Clark empaneled a three-judge court and designated Circuit Judge Will Garwood and District Judge Walter Smith to sit with Judge Nowlin on the case. Judge Nowlin was the managing judge for the litigation. Following discovery and other pretrial activity, the court conducted a four-day preliminary injunction hearing during December 10-13, 1991. The three-judge panel issued a preliminary injunction on December 24, 1991, imposing an interim redistricting plan for the 1992 election.

Shortly after the preliminary injunction issued, the Attorney General of Texas and other unsuccessful litigants in the Terrazas litigation began to complain of misconduct by Judge Nowlin and his staff. The core of the complaint was that Judge Nowlin had consulted State Representative George Pierce and enlisted his assistance in drawing the court-ordered redistricting plan. Mr. Earl also complained of communication between Judge Nowlin and Chief Justice Phillips of the Texas Supreme Court. The complaints received extensive press coverage. A number of motions based upon these facts, including motions to recuse Judge Nowlin, were filed in the Terrazas litigation.[1]

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[1]The motion to recuse was denied. An application for a writ of mandamus has been filed and is currently pending before a panel of the Fifth Circuit. The Committee expresses no opinion on the issue of recusal.

II. The Committee's Investigation

Shortly after the Chief Judge convened this Committee, the Texas Attorney General's office furnished us with copies of statements, depositions, and other exhibits it had obtained. After reviewing the investigative material and press clippings furnished us, the Committee immediately arranged to take Judge Nowlin's sworn testimony. All members of the Committee met in New Orleans and took Judge Nowlin's testimony on the morning of February 28.

We then arranged to take additional statements in Austin, Texas, on March 5, 1992. On that day, with all Committee members present, we took the sworn statements of the following witnesses: Britt Buchanan and J.D. Munn, law clerks to Judge Nowlin; Tina Hengst, computer operator at the Texas Legislative Council; Texas State Representative George Pierce; Michelle Bray, law clerk to Judge Garwood; Judge Will Garwood; and Judge Walter Smith. We also received a letter from Chief Justice Tom Phillips of the Texas Supreme Court in response to our inquiry about the circumstances surrounding this complaint.

III. The Facts

Based upon our investigation, we relate below the relevant facts that bear on the complaint against Judge Nowlin.

Judge Nowlin served in the Texas legislature for nearly 13 years prior to his appointment to the United States District Court in late 1981. While in the Texas legislature, Judge Nowlin represented a district in Bexar County that included the affluent towns of Alamo Heights and Terrell Hills, which are surrounded by

the City of San Antonio. When the Terrazas litigation was filed, Judge Nowlin learned from some of his acquaintances in the legislature that the Texas Legislative Council (TLC), an arm of the legislature, had acquired a sophisticated computer program that was very helpful in drawing district maps. In the weeks before the December 10 hearing, Judge Nowlin made arrangements for the three-judge court to have an account on TLC's computer system, called the RED.APPL (pronounced red apple) system. The RED.APPL's database contains extensive geographic and demographic information essential for redistricting. The three-judge court had two accounts on the RED.APPL system. These were called NOWL and NOW2. Each of these accounts can be considered a separate file in which information, maps, or similar documents can be stored and then called up when needed. Maps and other data from three proposed redistricting plans were entered in these accounts: (1) the Senate plan adopted by the Texas legislature in the 1991 regular session (SB-31); (2) the plan proposed by the plaintiffs (plaintiffs' plan); and (3) the Quiroz plan, a plan proposed in a consent judgment of a Texas state court.

Three law clerks worked on the RED.APPL system: Britt Buchanan and J.D. Munn from Judge Nowlin's chambers, and Michelle Bray from Judge Garwood's chambers. Britt Buchanan was the clerk from Judge Nowlin's chambers with primary responsibility for working on the redistricting plan; J.D. Munn spent very little time working on it. Judge Nowlin instructed his clerks to work primarily with the plaintiffs' plan as a starting point and make

modifications to that plan on the NOW2 account. Judge Garwood instructed Ms. Bray to use the SB-31 legislative plan as a starting point and make modifications to that plan on the NOWL account.

Law clerks needing to work on the RED.APPL system were required to make an appointment with TLC for computer time. When they arrived at the appointed hour a computer operator met them in the lobby of the computer area. The operator used an entry card to gain entry to the computer rooms and the law clerk logged in. The law clerk and the operator would then enter the separate computer room. The law clerk would instruct the operator to enter the name of the account (i.e., NOWL or NOW2) upon which he or she desired to work. After the operator entered the account name, the operator would turn the keyboard to the law clerk who would then enter the password. Although the account name appeared on the screen, the password did not. Thus, no one could gain access to either account without the proper password, and only the court personnel allegedly knew the password.

Once the account name and password were entered, the law clerk was ready to work on the account. Most of the work related to maps, which were part of the plans proposed by the litigants. In working with these maps and changing district lines, the law clerk directed the operator to make a change in a district line by pointing to the map on the screen and directing the operator where to move the line. The operator would then, by use of a "mouse," move the district line until it was in the desired location. The relevant voter population and racial and ethnic information would

print out on the screen so that the clerk could see what results had been accomplished by the change.

Much of the work was by trial and error, and the law clerk would continue to make changes until the voting population figures reached the desired level. When a law clerk completed his or her work on the RED.APPL for the day, the operator ordinarily would print out a map showing the geographic location of the district lines. A separate printout showed the ethnic and racial voting population composition. The law clerk then took this printout back to chambers for consultation with the judge.

With this background, we now turn to the specific facts giving rise to the complaint.

A.

Representative George Pierce served with Judge Nowlin in the Texas House of Representatives from approximately 1979 until Judge Nowlin was appointed to the district court in 1981. The two were acquainted before that, however, because Pierce worked as a staff member to various legislative committees before 1979, while Nowlin was a representative. During the 1980-81 redistricting process, Rep. Pierce was actively involved in drafting various plans proposed at that time, and developed considerable skill and familiarity with the use of computers in the preparation of redistricting plans. Judge Nowlin knew of Rep. Pierce's skill and intense interest in the use of computers for this purpose; he considered Pierce a "computer nut". During the two years they were both members of the House, they did not serve on the same

legislative committees. Although the two men were not close friends and did not visit in each other's homes, they had some contact because they were both Republicans serving from the San Antonio area.

After Judge Nowlin was appointed to the district court, he had very little contact with Rep. Pierce before this redistricting suit was filed. After this suit was filed, Rep. Pierce first made contact with Judge Nowlin in late November 1991, after a Texas state court adopted a redistricting plan (the Quiroz plan). He called Judge Nowlin to complain about the state-ordered plan and to inquire about the federal action. Judge Nowlin told him that a hearing had been set for December.

During the course of their conversation, Rep. Pierce told Judge Nowlin that he was not going to seek re-election. Pierce told him that his combined years in the House and other state employment offered him a good retirement and that his wife wanted him to retire. Judge Nowlin understood from this conversation that Pierce was leaving political life. Judge Nowlin knew that one was not eligible to receive retirement benefits under the Texas retirement plan while holding public office in Texas.

The next conversation Rep. Pierce had with Judge Nowlin was shortly after the three-judge court hearing of December 10. It was common knowledge in the legislature that the court was drawing a plan on TLC's RED.APPL computer system. Pierce called Judge Nowlin to tell him that he did not think that the court's work product was secure on the RED.APPL system. He told Judge Nowlin that he

believed TLC had the ability to gain access to the court's work in progress. A series of other minor contacts followed. Rep. Pierce stopped by Judge Nowlin's office on one occasion, but Judge Nowlin was not there and did not see him. Rep. Pierce had intended to ask Judge Nowlin if an opinion was imminent. The next conversation was on Saturday, December 20, or Sunday, December 21. On this occasion, Judge Nowlin called Pierce to complain that Bob Kelly, the executive director of TLC, had failed to show up for an appointment. Judge Nowlin had scheduled a meeting with Mr. Kelly at the TLC office after Kelly proposed that TLC review the court's plan for technical errors, such as omission of a voting precinct. This failure of Mr. Kelly to maintain the appointment with Judge Nowlin increased Judge Nowlin's concern, prompting Judge Nowlin's call to Rep. Pierce to ask him to check on Kelly.

The next meeting between Rep. Pierce and Judge Nowlin, and the events related to that meeting, form the basis of the complaint at issue here. On the morning of December 23, Judge Nowlin and his staff were busily engaged in preparing a proposed draft opinion for the three-judge court. This included putting the final touches on the district lines of the plan Judge Nowlin planned to propose to his fellow judges. In making his final review of this Senate plan, he decided to move two affluent small cities, Alamo Heights and Terrell Hills, out of minority District 19 and put them in majority District 26. Judge Nowlin was familiar with these two towns because he had represented them in the Texas legislature.

Rep. Pierce stopped by Judge Nowlin's chambers around mid-morning on December 23 to report on his attempt to locate Mr. Kelly. After doing so, Judge Nowlin discussed with Pierce the change he had decided to make in Senate Districts 19 and 26. Judge Nowlin told Rep. Pierce that he wanted to move Alamo Heights and Terrell Hills from District 19 to District 26. Judge Nowlin testified that he also told Rep. Pierce that a loosely defined community known as Castle Hills would have to be moved from District 26 to District 19. According to Rep. Pierce, Judge Nowlin did not specify what areas he wanted moved out of District 26, nor did he mention Castle Hills. Judge Nowlin and Rep. Pierce did not discuss the location of the residences of any incumbents in the Texas legislature.

Judge Nowlin decided to send Rep. Pierce and one of the judge's law clerks to make the desired changes on the RED.APPL system. Britt Buchanan, Judge Nowlin's clerk most familiar with the redistricting case, was working on a draft of the proposed opinion. Judge Nowlin decided to send his second clerk, J.D. Munn, and called Mr. Munn into his chambers where he was speaking with Rep. Pierce. Judge Nowlin instructed Mr. Munn to accompany Rep. Pierce to TLC to make changes in Senate Districts 19 and 26 in Bexar County. Mr. Munn testified that he recalled hearing Judge Nowlin tell his co-clerk, Britt Buchanan, about a week earlier that he wanted to move some neighborhoods in San Antonio, and that he specifically heard Judge Nowlin mention Alamo Heights. Mr. Munn assumed that the changes the Judge had talked with Rep. Pierce

about related to that earlier conversation. Although Mr. Munn was not informed as to the specific changes to be made, he thought that Judge Nowlin had told Rep. Pierce what changes to make.

Judge Nowlin testified that he sent Rep. Pierce with Mr. Munn because of Pierce's dual familiarity with computers and the communities around San Antonio. Mr. Munn was unfamiliar with the San Antonio area. Judge Nowlin felt that Rep. Pierce's help at TLC would speed up the process. Judge Nowlin instructed Mr. Munn to bring back to chambers for the court's review a map and printout of the changes he and Rep. Pierce made.

Mr. Munn proceeded to TLC with Rep. Pierce, as instructed. They gained access to the computer room in the usual way, as described above. Tina Hengst, one of the TLC operators, met them in the lobby and used her card to gain entry into the computer area. Mr. Munn then signed in on the log book. The computer operator entered the NOW2 account, as instructed by Munn. Mr. Munn then entered the password. After the operator pulled up the account, Mr. Munn made some changes in accordance with Judge Nowlin's instructions that were unrelated to the Bexar County changes under discussion here. Rep. Pierce had nothing to do with those changes.

After Mr. Munn finished these changes, he and Rep. Pierce changed positions so that Rep. Pierce could direct the computer operator. The operator, at Rep. Pierce's request, then zoomed in on Bexar County. Rep. Pierce proceeded to give instructions to Ms. Hengst. He showed Ms. Hengst on the map what areas to move out of

District 19. This included generally the area within the city limits of Alamo Heights and Terrell Hills, plus some adjacent areas that were within the Alamo Heights Independent School District. He then instructed Ms. Hengst to move Voting Tabulation Districts (VTDs) in District 26 that were closest to District 19 into District 19 to make up for the VTDs that had just been moved out of District 19. Castle Hills was one of the communities moved from District 26 to District 19. Rep. Pierce made two or three moves before he restored the total voting populations in the two districts to the required levels, and minority voting population in District 19 to the desired level. Rep. Pierce directed Ms. Hengst on the computer for approximately 20 to 30 minutes.

After these changes were made, Ms. Hengst gave Mr. Munn a printout of a map reflecting the districts as modified. She also gave him a printout of the new demographic statistical information. Mr. Munn took the map and additional information back to Judge Nowlin.

The changes Rep. Pierce and Mr. Munn made to Senate Districts 19 and 26 the morning of December 23 produced a slight increase in the percentage of Hispanic voting-age population in District 19, from 55.78% to 56.26%, and an increase in minority (black and Hispanic) voting-age population from 60.37% to 60.69%. The Pierce/Munn changes also resulted in a slight decrease, from 19.16% to 18.89%, in the percentage of minority voting-age population in District 26, which was already a majority Anglo district.

The only portion of the court's work product Rep. Pierce observed was the Senate districts in Bexar County located in the NOW2 account. The NOWL account was not displayed to Rep. Pierce. In making the changes to Districts 19 and 26, Rep. Pierce did not call up on the computer screen the location of the residences of any incumbent members of the Texas Senate or House of Representatives.

During the afternoon of December 23, Judge Garwood and Judge Nowlin met to discuss the final opinion and court redistricting plan for the entire State. They conferred at length with Judge Smith on the telephone. The judges agreed to adopt the plan that had been drawn on the NOWL account with certain modifications to be made that afternoon. Among those modifications were the changes to Senate Districts 19 and 26 discussed above. Judges Garwood and Smith explained that the increase in minority voting population in District 19, the minority district, was their reason for approving the changes. Neither Judge Garwood nor Judge Smith had any knowledge that Rep. Pierce had played a role in making the changes in these two districts.

Shortly after 5:00 p.m. on December 23, Britt Buchanan and Michelle Bray went to the TLC office to make the final changes on the maps in the NOWL account. They attempted to duplicate in the NOWL account the changes Rep. Pierce and Mr. Munn had made to Senate Districts 19 and 26 in the NOW2 account earlier that day. Thus, except for minor errors the law clerks made in duplicating the NOWL map of Bexar County showing Senate district lines, the

changes Rep. Pierce made, at Judge Nowlin's direction, in Districts 19 and 26 became part of the final plan adopted by the court.

Rep. Pierce formally announced on January 8, 1992, that he would seek election to the Senate from District 26. Pierce designated his campaign treasurer with the Texas Secretary of State that same day. When Texas officials learned that Pierce had played a role in modifying Senate District 26 on December 23 and that he had announced his candidacy for this district, obvious inferences were drawn. The Attorney General of Texas and others concluded that Judge Nowlin allowed his former colleague to draw himself a safe Senate district.

B.

In evaluating Judge Nowlin's conduct, one of the central questions that concerns us is whether Judge Nowlin knew or suspected on December 23, 1991, that Rep. Pierce was considering running for a legislative office, particularly a seat in the Senate from District 26.

As stated above, Judge Nowlin, in his testimony to us, asserted that Rep. Pierce told him in late November 1991 that he intended to retire from the legislature. According to Judge Nowlin, Pierce told him that he was eligible for retirement and that his wife had insisted that he retire.

Rep. Pierce, in his sworn statement to this Committee, confirmed this discussion with Judge Nowlin. He asserted that in his conversation with Judge Nowlin in late November 1991, he told Judge Nowlin that he was not going to run again. Rep. Pierce told

Judge Nowlin that he was eligible for a good retirement, and his wife wanted him to retire. According to Pierce, this would have made it plain to Judge Nowlin that he did not intend to run for any legislative office because everyone familiar with the system knows that one must be out of office to be eligible for retirement. Rep. Pierce told us further that he had no reason to believe that Judge Nowlin had any knowledge before December 1991 of any plans he might have had to run for the Senate. This statement may be read as contradictory to a statement Pierce made in his February 3, 1992, deposition taken by the Texas Attorney General in connection with the Terrazas litigation. Rep. Pierce testified as follows in that deposition:

> Q: Would it be possible that Judge Nowlin would have been aware of your interest in a Senate race within the last six months?
>
> A: Sure. Let's face it, we are friends . . .
>
> Q: So it's your belief that he would have been aware of your interest in seeking a Senate race within the last six months?
>
> A: Sure, it's been in the newspapers. It's been in publications. It's been put out everywhere.

We questioned Rep. Pierce about this apparent inconsistency. He testified that he understood the question in the deposition to address Judge Nowlin's knowledge of his interest in the Senate seat within the six-month period preceding his February deposition. Rep. Pierce stated to us that when he answered the question in the deposition, he was thinking of knowledge Judge Nowlin obviously acquired from extensive press coverage in January and February 1992 about this incident. In other words, Rep. Pierce stated that he

was addressing his impression of Judge Nowlin's knowledge during the weeks preceding the February 3 deposition and not during November and December 1991.

The Texas Attorney General points to an earlier reference by Pierce in his deposition that he had begun to formulate an interest in running for the Senate about a year before his deposition was given. Rep. Pierce explained to us, however, that while he indeed had expressed interest in running for the Senate in early 1991, he later changed his mind.

We also questioned Rep. Pierce about what ultimately made him decide to run for the Senate from District 26. He stated that when it became apparent to him that the only candidate for the Senate seat from Bexar County was Alan Schoolcraft, he decided to run. This fact was critical to his decision because of his impression that Alan Schoolcraft was not a strong candidate. Rep. Pierce concluded that if he did not run, the District 26 senator would come from one of the counties north of Bexar County, and he did not want to see Bexar County lose this Senate seat.

The Fifth Circuit librarian, at our request, investigated whether any newspaper articles appeared in Austin or San Antonio before December 23, 1991, concerning Rep. Pierce's plans to run for the Senate. She found no articles in any Austin newspaper. She did find articles in the San Antonio Light in May, June, and December 1991 discussing the possibility that Pierce would run for the Senate.

Judge Nowlin does not subscribe to or regularly read a San Antonio newspaper. We find no reason to believe that Judge Nowlin had knowledge of the articles in the San Antonio Light suggesting that Pierce might run for the Senate. We also find no reason to discredit Judge Nowlin's statement that Rep. Pierce told him in unequivocal terms that he had no plans to run for any legislative office. Rep. Pierce's sworn statement to our Committee on this point fully confirms Judge Nowlin's testimony. Rep. Pierce's explanation of his arguably inconsistent prior testimony is not implausible. The prior testimony was in response to a question inviting Rep. Pierce to speculate about Judge Nowlin's knowledge, and the question was ambiguous with respect to the time frame in which Judge Nowlin's knowledge was to be evaluated. We conclude that, whatever Pierce's actual political intentions may have been in December 1991, Judge Nowlin did not regard Pierce as a candidate for the state Senate at that time.

Moreover, the evidence clearly establishes that the changes to Districts 19 and 26 were initiated by Judge Nowlin, not by Rep. Pierce. Judge Nowlin was intimately familiar with Terrell Hills and Alamo Heights. He neither needed nor sought input from Pierce on whether those two entities had more in common with District 19 or 26. Judge Nowlin felt some loyalty toward the two towns because he had represented them in the legislature. Judge Nowlin believed, correctly, that by transferring these two towns to District 26, he could place those entities in a District of what he perceived to be

more common interests, and simultaneously increase the minority voting population in District 19.

The evidence further reflects that in agreeing to implement Judge Nowlin's instructions, Rep. Pierce was not enhancing his own electability. Pierce testified persuasively that Senate District 26, as finally drawn, was not a district from which he could easily win.[1] Alan Schoolcraft, a potential District 26 candidate, had represented Alamo Heights and Terrell Hills for some time in the Texas House of Representatives. On the other hand, Rep. Pierce's core supporters came from the Castle Hills area, which he took out of District 26 and put into District 19. Indeed, one of the documents that tracked the changes Rep. Pierce directed on December 23 demonstrates that Rep. Pierce moved more VTDs from Castle Hills than were necessary. The computer-generated tracking device shows that, after the populations of Districts 19 and 26 were within 5% of the desired level (which is all that is required), additional voting precincts were shifted out of District 26 into District 19. When we examined the historical voting patterns of the VTDs Rep. Pierce moved out of District 26, particularly those he moved unnecessarily, the records indicated that those voters strongly supported Rep. Pierce.

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[1]Although we do not discount the political damage to Rep. Pierce from the extensive publicity surrounding these changes, we observe that later events bore out his pessimism. In the March 1992 primary, Rep. Pierce ran fourth in a five-person race, garnering 8% of the vote.

Although the above charge is the central one made against Judge Nowlin, Mr. Earl and the Attorney General of Texas make three additional, somewhat related charges that require discussion.

First, the complainants charge that Rep. Pierce and a number of other members of the Texas legislature made multiple telephone calls to Judge Nowlin. This is supported by computer records that automatically document each call made from legislative offices in Austin. The computer record shows both the calling number and the number called, as well as the approximate length of the call. The record does not, however, identify either the person who originated the call nor the person who answered the call. The relevant records reflect approximately 22 calls from Rep. Pierce's office to Judge Nowlin's chambers. Almost all of these calls are shown as lasting two to three minutes. In addition to these calls, the records reflect a large number of calls in the two-to-three minute range from twelve other state legislators. We note initially that the telephone call recorder registers all calls made, not just completed calls, and that its minimum register is two minutes, even if a call actually lasts only a few seconds.

Our investigation revealed that Judge Nowlin seldom personally answers the telephones in his chambers. The telephone is answered either by the secretary, a law clerk, or an answering machine. Frequently, when Judge Nowlin and his staff are busy, they activate the answering machine. Rep. Pierce's calls to Judge Nowlin that exceed two or three minutes are accounted for and are discussed

above. The law clerks, as well as Judge Nowlin, testified that while the redistricting suit was in progress, his office received multiple calls daily from members of the public including members of the state legislature seeking a progress report on the suit. The caller typically was interested in knowing the date the court would reach a decision. Some of these calls were taken on the answering machine and the caller spoke with no one. On other occasions, the caller spoke with the secretary or a law clerk. From the evidence and our independent knowledge of the acute interest the public holds for litigation of this type, we have no reason to doubt this explanation for the multiple calls made from legislative offices to Judge Nowlin's chambers. We therefore drew no inferences of impropriety by Judge Nowlin from this evidence.

Mr. Earl, and some reports from the press, also complain about contact between Judge Nowlin and Chief Justice Tom Phillips of the Texas Supreme Court. Judge Nowlin and Chief Justice Phillips have given the Committee a consistent, plausible explanation for this contact. The Texas Supreme Court had before it a writ application seeking review of the state district court consent judgment that imposed the Quiroz plan. On December 3, 1991, Chief Justice Phillips contacted Judge Nowlin and asked Judge Nowlin to postpone commencement of his hearing until the afternoon of December 10 so that counsel could appear before the Texas Supreme Court for argument of that appeal. Judge Nowlin, Judge Garwood, and Judge Smith discussed the effect of the state court judgment and whether they should wait until the Texas Supreme Court reviewed the Texas

District Court order before proceeding with the suit pending before the three-judge court. Later, Judge Nowlin contacted Chief Justice Phillips to inquire whether the Supreme Court had issued a decision on its review of the Quiroz plan. On December 17, 1991, Chief Justice Phillips called Judge Nowlin immediately after the Texas Supreme Court released its opinion.

We find no impropriety in the contacts between Judge Nowlin and Chief Justice Phillips. The conversations did not relate to the merits of the litigation. Rather, they were for the purpose of coordinating hearings in the related litigation and learning when the Texas Supreme Court issued its opinion.

D.

Finally, the Attorney General and the press have suggested that Judge Nowlin permitted Rep. Pierce to alter District 26 to place the residences of some of his potential opponents for the Senate seat outside of District 26. These potential opponents include Cyndi Krier, Jeff Wentworth, and Alan Schoolcraft.

We note initially that residence inside a senatorial district is not a requirement for eligibility to run in that district under the court's redistricting plan. Rather, candidates may run for any district regardless of their place of residence. Nevertheless, living outside the district in which a candidate runs can be an obvious political liability.

We are persuaded from the evidence that Judge Nowlin had no intention to move any of these potential Senate candidates' residences outside any particular district. Judge Nowlin and Rep.

Pierce did not discuss the location of residence of any incumbents. The law clerks who did most of the work on the computer testified that they had no knowledge of the location of the residences of any of these potential candidates. They also denied receiving any instructions from Judge Nowlin to fix the lines in such a way as to place the residences of these candidates either in or out of any particular district.

Rep. Pierce also denied considering the residences of any of these potential candidates when he moved the lines for Districts 19 and 26. Pierce's changes apparently moved Jeff Wentworth and Cyndi Krier's residences from District 26 to District 19. Their residences were near the District 19 line and Castle Hills. Once Castle Hills was moved into District 19, their residences would have logically moved into District 19. In other words, Rep. Pierce simply moved adjacent VTDs from District 26 into District 19; no apparent irregularity is presented about which VTDs were moved from District 26 to District 19. We reiterate that the locations of incumbents' residences were not displayed to Rep. Pierce on the RED.APPL system on December 23.

Alan Schoolcraft's home was in the northeastern corner of Bexar County. A single VTD, which included his residence, was moved from District 24 into District 26. We draw no negative inference from this isolated change, however, for two reasons. First, Rep. Pierce was not involved with this decision. As we interpret the testimony and the computer records, this change was made around 5:00 p.m. on December 23 by Britt Buchanan, who

apparently was trying to increase minority representation in District 24. Second, the change in Mr. Schoolcraft's VTD placed his residence inside of District 26, it having been in District 24 in previous maps. Obviously, it would have been against Rep. Pierce's interest to move a potential rival into the District from which Pierce intended to run.

We find no merit, therefore, to the complaints that are predicated on these three latter grounds. We do, however, find substance to the first complaint discussed above, which we analyze below.

III. CONCLUSION AND RECOMMENDATION

The Judicial Council must determine whether Judge Nowlin "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). We believe it may be helpful to consider first some of the charges leveled against Judge Nowlin that have not been established. We find no evidence that Judge Nowlin had a corrupt or evil motive in asking Rep. Pierce to assist in altering the court's redistricting plan. As indicated above, we do not believe that Judge Nowlin knew in December 1991 that Rep. Pierce planned to run for a legislative seat in 1992. Moreover, Judge Nowlin did not intend to allow Rep. Pierce to draw himself a favorable Senate district from which to run. We conclude that Judge Nowlin was rushing to get his proposed opinion in final form to present to his fellow panel members later that day so that it could be released before Christmas. He had confidence in Rep. Pierce, who was very

knowledgeable about computer redistricting and about the geography of Bexar County. It would have taken Mr. Munn and Ms. Hengst, acting alone, much longer -- perhaps several hours -- to accomplish the same changes Rep. Pierce was able to complete in thirty minutes. The use of Rep. Pierce allowed Judge Nowlin to obtain the map of the new Districts 19 and 26, along with the statistical information, in time for his meeting with his fellow judges on the afternoon of December 23. We also find that Rep. Pierce's involvement was limited to Districts 19 and 26 and that he had no input of any kind with respect to any other part of the redistricting plan in any other part of the State.

We are persuaded, however, that Judge Nowlin made a serious mistake in judgment when he asked Rep. Pierce to assist in making changes in a portion of the court's redistricting plan. Although Judge Nowlin reviewed and approved the changes Rep. Pierce made, Pierce, unfortunately, enjoyed latitude in deciding precisely what areas to move in the two Districts. Judge Nowlin gave no instructions to his law clerk, J.D. Munn, as to what changes should be made to Bexar County. Although Judge Nowlin's instructions to Rep. Pierce were general in nature, Pierce understood what Nowlin wanted him to do: move Alamo Heights and Terrell Hills from District 19 to District 26 and compensate District 19 by moving the adjacent areas of then District 26 (primarily Castle Hills) from District 26 into District 19. Both Judge Nowlin and Rep. Pierce must have realized that Pierce would need to engage in some trial and error exercises to accomplish this switch. This was the only

way Rep. Pierce could achieve the required total population levels in the two districts and at the same time increase the minority voting population in District 19.

Judge Nowlin's conduct was inconsistent with the limitation of Judicial Canon 3A(4)[3] that prohibits ex parte communication with a party interested in pending litigation. Rep. Pierce obviously was someone with a potential and, as it developed, actual legal interest in the proceeding. Even if Rep. Pierce could have been considered a "disinterested expert," Judge Nowlin did not disclose his contact with Pierce to the parties, as required by Canon 3A(4). We stress that the "communication" between Judge Nowlin and Rep. Pierce was not the kind one normally contemplates in connection with this Canon. As we have previously indicated, there is no evidence that Judge Nowlin solicited or received any advice, as such, from Rep. Pierce with respect to the redistricting. We have also previously noted that the initiative for moving Alamo Heights and Terrell Hills came from Judge Nowlin, who requested Rep. Pierce to implement this change in much the same way that he might have

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[3] Canon 3A. Adjudicative Responsibilities

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

instructed a law clerk. Nevertheless, we have also concluded that Rep. Pierce was afforded discretion in carrying out his charge, particularly with respect to compensating District 19 for the areas to be moved out. The end result of Rep. Pierce's efforts were then printed and thereafter "communicated" to Judge Nowlin via Mr. Munn. This "communication" was then considered by Judge Nowlin and essentially incorporated into the final plan.

Judge Nowlin's conduct was also inconsistent with the admonitions of Canon 2A, which constrains a judge to avoid not just impropriety but also the "appearance of impropriety" in order to avoid erosion of public confidence through "irresponsible conduct by judges." Judge Nowlin should have realized that allowing Rep. Pierce to participate in drawing district lines would give a serious perception of impropriety. As a member of the legislative body being redistricted, Rep. Pierce had a keen interest in the process. Although Judge Nowlin was convinced that Rep. Pierce had no intention of being a candidate, Judge Nowlin had no way of knowing what rewards or punishments Pierce may have wanted to heap on his associates. The entire redistricting issue had generated intense partisan interest by December 23, 1991, as was inevitable. For a judge of the court panel faced with resolving this controversy to privately call upon an elected member of the legislature for assistance in that task, regardless of how limited, would clearly have the appearance of impropriety for any reasonable observer.

Judge Nowlin and his family have unfortunately suffered considerably from the public accusation of corruption and evil motive. As noted above, we find no foundation for these charges. We do conclude, however, that Judge Nowlin's unthinking ex parte contact with Rep. Pierce and allowing Rep. Pierce to play a role in this sensitive redistricting case amounts to conduct inconsistent with Canons 2A and 3A(4) and prejudicial to the effective administration of the business of the courts in violation of 28 U.S.C. § 372(c)(1). For these reasons, we recommend that the Council reprimand Judge Nowlin for his conduct and caution him to exercise greater care in such matters in the future.

Respectfully submitted,

Chief Judge Henry A. Politz
Judge W. Eugene Davis (Chairman)
Judge Harold R. DeMoss, Jr.
Judge William Wayne Justice
Judge George P. Kazen